



# San Francisco Law Library

No. 77043


Presented by

---

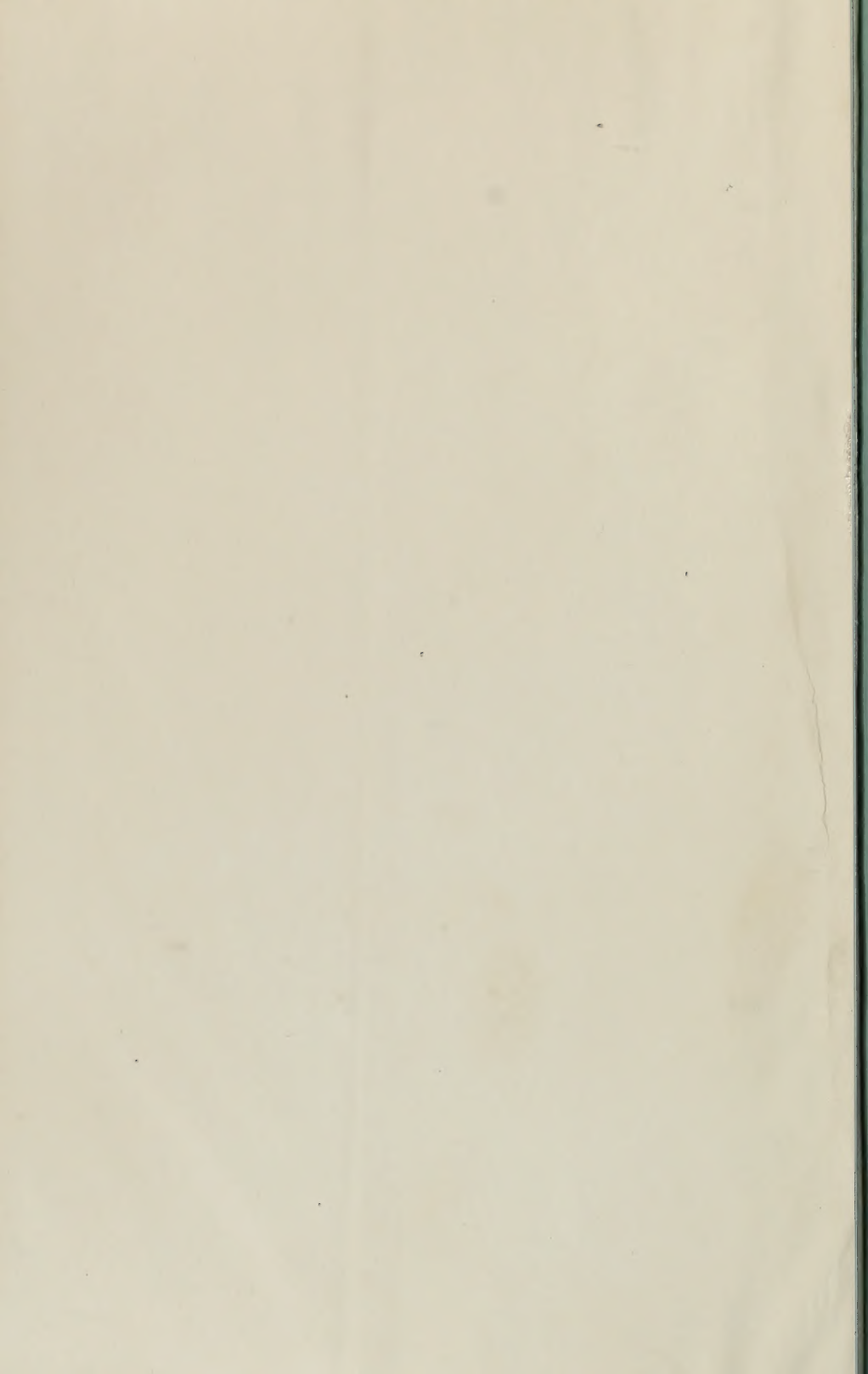
## EXTRACT FROM BY-LAWS

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.



Digitized by the Internet Archive  
in 2010 with funding from  
Public.Resource.Org and Law.Gov





1312

No. 3840

1313

United States  
1 1313  
Circuit Court of Appeals

For the Ninth Circuit.

MURRAY L. McGREW and FRANK L. BOYD,  
Plaintiffs in Error,  
vs.

THE UNITED STATES OF AMERICA,  
Defendant in Error.

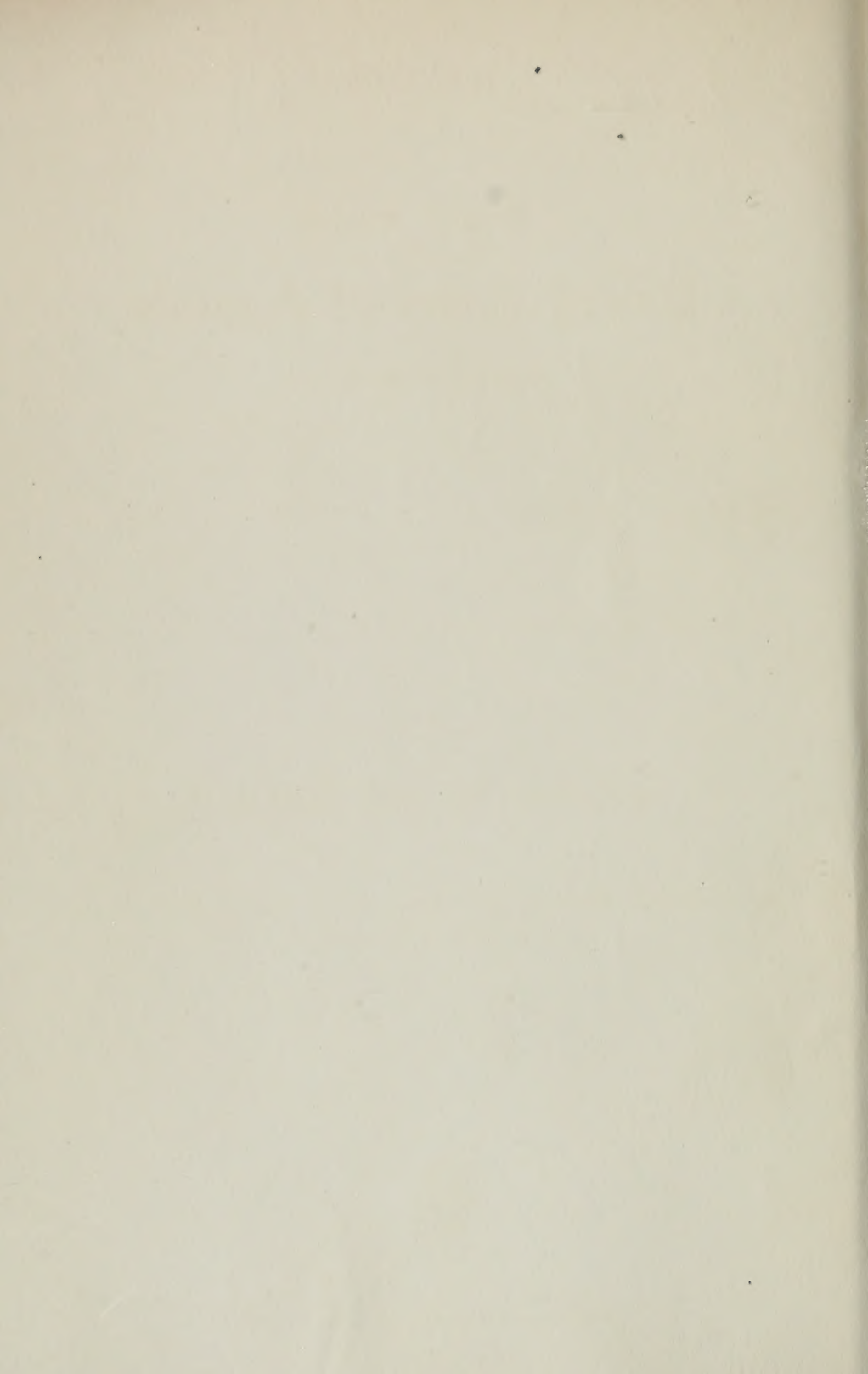
Transcript of Record.

Upon Writ of Error to the United States District Court of the  
District of Montana.

FILED

MAR 25 1922

F. D. MONCKTON,  
CLERK.





United States  
Circuit Court of Appeals  
For the Ninth Circuit.

---

MURRAY L. MCGREW and FRANK L. BOYD,  
Plaintiffs in Error,

VS.

THE UNITED STATES OF AMERICA,  
Defendant in Error.

---

Transcript of Record.

---

Upon Writ of Error to the United States District Court of the  
District of Montana.

---





# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

---

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Affidavit of U. W. Hammaker.....	5
Affidavit of J. A. Kavaney of Mailing of Bill of Exceptions .....	26
Answer of Court to Writ of Error.....	39
Arraignment and Plea....	7
Assignment of Errors.....	28
Certificate of Clerk U. S. District Court to Transcript of Record.....	42
Certificate of Judge to Bill of Exceptions.....	24
Citation on Writ of Error.....	36

## EXHIBITS:

Exhibit "A"—Order for Return of Prop- erty .....	16
Information .....	2
Judgment .....	9
Names and Addresses of Attorneys of Record..	1
Order Allowing Writ of Error.....	35
Petition for Writ of Error.....	27
Proposed Bill of Exceptions.....	11
Supersedeas Bond on Writ of Error.....	40

Index.	Page
TESTIMONY ON BEHALF OF THE GOV- ERNMENT:	
CAMPBELL, GEORGE .....	22
HAMMAKER, U. W.....	18
Verdict .....	8
Writ of Error.....	38



**Names and Addresses of Attorneys of Record.**

J. A. KAVANEY, Esq., of Fort Benton, Montana,  
Attorney for Plaintiffs in Error.

JOHN L. SLATTERY, Esq., U. S. Attorney,  
RONALD HIGGINS, Esq., Assistant U. S.  
Attorney, and W. H. MEIGS, Esq., Assistant  
U. S. Attorney, all of Helena, Montana,  
Attorneys for Defendant in Error.

---

In the District Court of the United States in and  
for the District of Montana.

No. 3943.

THE UNITED STATES OF AMERICA,  
Plaintiff,

vs.

MURRAY L. MCGREW and FRANK L. BOYD,  
Defendants.

BE IT REMEMBERED, that on December 15,  
1921, an Information was filed herein against the  
defendants above named, in the words and figures  
following, to wit: [1\*]

---

\*Page-number appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States, District  
of Montana, Great Falls Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MURRAY L. MCGREW and FRANK L. BOYD,  
Defendants.

**Information.**

BE IT REMEMBERED, That Ronald Higgins, Assistant United States Attorney for the District of Montana, who for the said United States, in its behalf, prosecutes in his own person, comes here into the District Court of the United States for the District of Montana, on the 15th day of December, 1921, in the May, 1921, term of court, held at the city of Great Falls, in the State and District of Montana, and for the United States of America gives the Court to understand and be informed:

That on or about the 10th day of November, 1921, one Murray L. McGrew, and one Frank L. Boyd, whose true names are to the informant unknown, in the County of Chouteau, in the State and District of Montana, and within the jurisdiction of this Court, did then and there wrongfully and unlawfully transport intoxicating liquor, the exact quantity and character of which is to the informant unknown, without then and there first obtaining a permit from the Commissioner of Internal Revenue so to do; contrary to the form of the statute in such case



made and provided, and against the peace and dignity of the United States of America.

### SECOND COUNT.

And the informant aforesaid further gives the Court to understand and be informed:

That on or about the 10th day of November, 1921, said Murray L. McGrew and said Frank L. Boyd, whose true names are to the informant [2] unknown, in the County of Chouteau, in the State and District of Montana, and within the jurisdiction of this Court, did then and there wrongfully and unlawfully transport intoxicating liquor, the exact quantity and character of which is to the informant unknown, without making at the time a permanent record thereof, showing in detail the amount and kind of liquor transported, together with the names and addresses of the consignor and consignee, and the time and place of such transportation; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

### THIRD COUNT.

And the informant aforesaid further gives the Court to understand and be informed:

That on or about the 10th day of November, 1921, said Murray L. McGrew and one Frank L. Boyd, whose true names are to the informant unknown, in the County of Chouteau, in the State and District of Montana, and within the jurisdiction of this Court, did then and there wrongfully and unlawfully have and possess intoxicating liquor intended for use in violation of the National Prohibition Act;

contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

RONALD HIGGINS.

Assistant United States Attorney, District of Mon-  
tana.

United States of America,  
District of Montana.—ss.

Ronald Higgins, being first duly sworn, on oath deposes and says:

That he is a duly appointed, qualified and acting Assistant United States Attorney for the District of Montana, and as such makes this verification to the foregoing information; that he knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

RONALD HIGGINS. [3]

Subscribed and sworn to before me this 15th day  
of December, 1921.

[Seal]

H. H. WALKER.

Deputy Clerk U. S. District Court, District of  
Montana.

[Indorsed]: No. 3943. Title of Court and Cause. Information. Bonds \$100.00 each. Filed December 15, 1921. C. R. Garlow, Clerk.

Thereafter, to wit, on the 15th day of December, 1921, an affidavit in support of the information was duly filed herein, being in the words and figures following, to wit: [4]

In the District Court of the United States, District  
of Montana.

UNITED STATES,

Plaintiff,

vs.

F. L. BOYD and L. M. McGREW and ONE  
STUDEBAKER AUTO, Model No. 327825;  
License, Mont. 38518,

Defendants.

**Affidavit of U. W. Hammaker.**

U. W. Hammaker, first being duly sworn, deposes and says: That on the 10th day of November, 1921, he was then and is now, duly appointed, qualified and acting Sheriff of Chouteau County, in the State of Montana. Affiant farther deposes and says:

That on the above date, in company with George Campbell, Deputy Sheriff of said county, at a point about (1) mile north of Virgelle, Mont., did stop and look into one Studebaker auto bearing Montana license No. 38516, Model No. 327825, and was found therein ten (10) cases of one pt. bottles of "Pebbleford whiskey," and said liquor being labeled with U. S. Internal Revenue counterfeit stamps, and twenty (20) full quarts of Baird Brothers Imp Scotch whiskey.

Affiant further states, that in said auto were two men who gave *there* names as Murray L. McGrew and F. L. Boyd and gave *there* address as Billings,



Montana. Affiant farther states that said Murry McGrew and F. L. Boyd said in the presence of himself and said deputy sheriff, Geo. Campbell, that they had twelve (12) cases of whiskey in said car and farther stated that they got said whiskey at Govenlock, Alberta, Canada and was en route to Billings, Montana, with said whiskey.

Affiant further states that he then and there took into custody the above-named *Deft's* and committed them to jail at Ft. Benton. Stored said car at La Barre garage at said place and now holds whiskey in his custody. [5]

Farther affiant sayeth not.

U. W. HAMMAKER,  
Sheriff Chouteau Co.

Subscribed and sworn to before me this 12th day of December, 1921.

L. S. GROFF,  
Deputy Collector U. S. I. R.

[Indorsed]: No. 3943. Title of Court and Cause. Affidavits. Filed Dec. 15, 1921. C. R. Garlow, Clerk.

---

Thereafter, to wit, on December 17, 1921, defendants were duly arraigned, entered pleas of not guilty and case set for trial, the minute entry of same being as follows, to wit: [6]

In the District Court of the United States in and  
for the District of Montana.

No. 3943.

UNITED STATES

vs.

MURRAY L. McGREW and FRANK L. BOYD.

**Arraignment and Plea.**

Defendants present in court this day and being arraigned they answered that their true names are, respectively, Murray L. McGrew and Frank L. Boyd. Thereupon, on motion of J. A. Kavaney, Esq., Court ordered that counsel's name be entered as attorney for defendants. Thereupon the information was read to the defendants, whereupon a plea of not guilty was ordered entered on behalf of each of the said defendants, and the case was set for trial December 20, 1921, at 9:30 A. M. Thereupon Court ordered that the petition for return of personal property and the suppression of the same as evidence, which was heretofore filed by the defendants, would be heard at the time of trial.

Entered in open court December 17, 1921.

C. R. GARLOW,

Clerk.

Thereafter, to wit, on December 20, 1921, the verdict of the jury was duly filed herein, being in the words and figures as follows, to wit: [7]

In the District Court of the United States, District  
of Montana.

UNITED STATES OF AMERICA,  
Plaintiff,

vs.

MURRAY McGREW and FRANK L. BOYD,  
Defendants.

**Verdict.**

We, the jury in the above-entitled cause, find the defendants guilty in manner and form as charged in the information on file herein.

THOMAS C. FERRIS,  
Foreman.

[Indorsed]: #3943. Title of Court and Cause.  
Verdict. Filed Dec. 20, 1921. C. R. Garlow, Clerk.

---

Thereafter, to wit, on December 20, 1921, judgment was duly rendered and entered herein, being in the words and figures as follows, to wit: [8]



In the District Court of the United States in and  
for the District of Montana.

No. 3943.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

MURRAY L. McGREW and FRANK L. BOYD,  
Defendants.

**Judgment.**

The United States Attorney with the defendants and their counsel present in court. The defendants were thereupon duly informed by the Court of the nature of the charge against them as appears in the information herein, and of their arraignment and pleas of not guilty, and of their trial and the verdict of the jury of guilty as charged.

And the defendants were then asked if they had any legal cause to show why judgment should not be pronounced against them, to which they replied that they had none, and no sufficient cause being shown or appearing to the Court, thereupon the Court rendered its judgment as follows, to wit:

That whereas the said defendants having been duly convicted in this court of the offense of wrongfully and unlawfully transporting intoxicating liquor without first obtaining a permit from the Commissioner of Internal Revenue so to do, and without making at the time a permanent record thereof; and wrongfully and unlawfully having and possessing intoxi-

eating liquor intended for use in violation of the National Prohibition Act, committed on the 10th day of November, 1921, in the County of Chouteau, of the State and District of Montana, as charged in the information herein.

It is therefore **CONSIDERED, ORDERED AND ADJUDGED** that for said offense you, the said Murray L. McGrew and Frank L. Boyd, do pay a single fine of Three Hundred Dollars, and costs taxed at \$79.65, and that you be confined in the Cascade County jail until said fine is paid or you are otherwise discharged according to law. [9]

Thereupon, on motion of defendants, commitment ordered stayed for twenty days for purposes of appeal, and defendants meanwhile released on bond heretofore given, if no appeal taken within that time, defendants to deliver themselves to the Sheriff of Cascade County.

Judgment rendered and entered December 20, 1921.

[Seal]

C. R. GARLOW,  
Clerk.

By H. H. Walker,  
Deputy.

Thereafter, to wit, on February 20, 1922, bill of exceptions was duly signed, settled and allowed, and filed, being in the words and figures following, to wit: [10]

In the District Court of the United States of  
America, for the District of Montana.

THE UNITED STATES OF AMERICA,  
Plaintiff,

vs.

MURRAY L. MCGREW and FRANK L. BOYD,  
Defendants.

**Proposed Bill of Exceptions.**

BE IT REMEMBERED: That on the 15th day of December, A. D. 1921, the Honorable John L. Slattery, United States District Attorney, for the District of Montana, duly empowered to inform of offenses and to prosecute for and on behalf of the Government, on leave of Court first being had and obtained, filed in said court, and information, charging and accusing these defendants with the crime of illegally possessing and transporting intoxicating liquors, and illegally importing the same, which said information is in the words and figures following, to wit:

(Clerk will here insert a copy of the information.)

That thereafter and on the 17th day of December, A. D. 1921, the said defendants, Murray L. McGrew and Frank L. Boyd, in company with their counsel, J. A. Kavaney, appeared before said Court, and they and each of them being required to plead to the allegations of said information, stood mute, whereupon the Court duly entered a plea of "Not guilty." And defendants thereupon filed in said court and cause a duly verified petition for the re-



turn of personal property and the suppression of the same as evidence, which said petition is in the words and figures following, to wit:

(Title of Court and Cause.)

“To the Honorable GEORGE M. BOURQUIN,  
Judge of the Above-entitled Court:

Comes now the above-named defendants, and petitions the above-entitled court for the return of certain property, [11] wrongfully held, under a wrongful and illegal seizure, by the officers of this Court, and for the suppression of the same as evidence against these defendants, and as grounds for said petition, on their oath inform this Honorable Court.

That on the morning of November 10th, 1921, at the hour of 2 o'clock A. M., during the night-time, while your petitioners were upon a public highway, in Chouteau County, Montana, to wit, on the highway between Big Sandy, Montana, and the station of Virgille Montana, where the highway passes under the Great Northern Railway, driving an automobile, they were without cause or warning, wrongfully, unlawfully, and without authority assaulted by one U. W. Hammaker, Sheriff of Chouteau County, Montana, and George Campbell, Deputy Sheriff of Chouteau County, Montana, with deadly weapons, the same being a loaded rifle in the hands of the said U. W. Hammaker, and a loaded revolver in the hands of the said George Campbell; that they were compelled to stop, and commanded to hold up their hands above their heads, to leave their car, and while so covered with deadly weapons, they were

forced to submit to a search of their persons, and effects, and that said sheriff and his deputy searched the automobile of these said petitioners, and placed handcuffs upon them, and did then proceed to the City of Fort Benton, Montana, compelling these petitioners to accompany him, and to take possession of all their said property and effects, and that he did then and there and thereupon, and without legal right or authority so to do, imprison said petitioners in the County Jail at Fort Benton, Montana, all which was without warrant or authority of the law, that no complaint had been made or warrant to search or other warrant issued as against these petitioners; that said arrest and seizure on the part of said sheriff and his deputy was wrongfully, unlawful, without warrant or authority, and [12] in contravention of the constitutional rights of these petitioners; and in contravention of Article IV of the Constitution of the United States of America, and in contravention of section 7 of Article III of the Constitution of the State of Montana.

That thereafter and on the 10th day of November, A. D. 1921, in the District Court of the Twelfth Judicial District of the State of Montana, in and for the County of Chouteau, the County Attorney filed an information charging and accusing these petitioners with the crime of illegally possessing and transporting intoxicating liquors, whereupon these petitioners filed in said court their petition demanding the return of said property and the suppression of the same as evidence.

That on the 12th day of December, A. D. 1921, said cause was dismissed by the said District Court, and by order of that date said sheriff was directed to return and redeliver to said defendants the property taken from said petitioners by said sheriff, a copy of which said order is hereto attached, marked Exhibit "A" and by this reference hereto made a part.

That on said date and prior thereto said Sheriff U. W. Hammaker was in communication with the office of Federal Prohibition Law enforcement office at Great Falls, and Helena, Montana, and more particularly one Benjamin Holter and L. S. Groff, the later, who was present at the time of the order of said Court and knew that said order was made, and who through collusion with the said sheriff of Chouteau County, U. W. Hammaker, did refuse and prevent the return and redelivery of said property thus wrongfully taken from these petitioners, but that the said L. S. Groff did wilfully, unlawfully and without warrant therefore, and in contravention of the constitutional rights of these petitioners, arrest the persons, and seize the property of these petitioners, and has [13] since failed and refused to deliver the same to these petitioners, all of which was done without warrant or authority for so doing, and in contravention of Article IV of the Amendments of the Constitution of the United States of America; that said wrong has been a continuing wrong; that the rights of these petitioners *has* been most flagrantly and unwarrantedly violated.



That the property thus wrongfully and unlawfully seized consists of 240 pint bottles or glass containers, filled with liquid and labelled 'Pebble Ford,' 24 glass containers of about 40 ounce size, containing liquid and labelled 'Biard's Scotch,' one 45-caliber Colt's automatic revolver; one 32-caliber Colt's automatic revolver, and certain personal effects together with one seven passenger touring automobile, Studebaker No. 327,825, all of which are illegally and unlawfully held by the said L. S. Groff, the same having been seized without warrant, and without authority on the part of the said L. S. Groff, and in defiance of the orders of the District Court as aforesaid.

WHEREFORE: Your petitioners pray the order of this Court that the said L. S. Groff immediately return to these petitioners all of said property so wrongfully and unlawfully taken from them, which consists of 240 pint bottles or glass containers filled with liquid and labelled 'Pebble Ford,' 24 glass containers of about 40-ounce size, filled with liquid and labelled 'Biard's Scotch'; one 45-caliber Colt's automatic revolver; one 32-caliber Colt's automatic revolver, and certain personal effects, together with one seven passenger touring automobile, Studebaker No. 327,825, all of which are illegally and unlawfully held by said L. S. Groff, having been seized without warrant, or any authority whatsoever and that the action of said L. S. Groff be declared null and void, and of no effect; and that the same and the whole thereof be [14] suppressed as evidence against

these petitioners, for the reason that it is in contravention of the constitutional rights of these petitioners, and in contravention of Article IV of the United States Constitution, and the laws generally relative to search and seizure, and that said officers be enjoined from further molesting these petitioners, or in any wise giving evidence thus wrongfully and unlawfully secured, as against these petitioners.

(Signed) MURRAY L. MCGREW.

(Signed) FRANK L. BOYD."

(Duly verified and filed.)

Filed December 17th, 1921.

**Exhibit "A."**

"In the District Court of the Twelfth Judicial District of the State of Montana, in and for the County of Chouteau.

THE STATE OF MONTANA,

Plaintiff,

vs.

MURRAY L. MCGREW and FRANK L. BOYD,

Defendants.

**ORDER.**

On the 10th day of November, 1921, the County Attorney filed information in the above-entitled cause, charging the defendants with illegally possessing and transporting intoxicating liquors.

Now comes the County Attorney and moves the Court to dismiss said information. The Court being advised in the premises, it is by the Court or-

dered that the said motion be and it is hereby granted, and it is ordered that said information be and it is hereby dismissed.

It is further ordered that the property taken by the [15] sheriff from said defendants McGrew and Boyd be returned and redelivered to them, and that the bail fixed by said information be and it is hereby released.

December 12, 1921.

(Signed) JNO. W. TATTAN,  
Judge."

That said cause was thereupon set for trial for the 20th day of December, A. D. 1921, on which date at the opening of said court, at its courtroom, in the City of Great Falls, Montana, said cause was regularly called for trial; a jury having been duly and regularly impaneled, and sworn to try said cause, the Court did then excuse said jury, and take up the petition of said defendants and proceed to a hearing of the same; witnesses were sworn and examined, and proof having been offered and heard in support of said petition, and upon the conclusion thereof; the Court denied said petition upon the ground that "It makes no difference how evidence may have been obtained by a sheriff, even though by a wrongful seizure, it is still admissible as evidence in the Federal Court as against the defendants," and upon the further ground the "Where liquor is placed in a car and started to move without a permit, it (the liquor and vehicle or

conveyance) immediately becomes forfeited to the Government." To which the defendants by counsel, duly excepted.

The Court did thereupon recall the jury and proceed to the trial of said cause.

**Testimony of U. W. Hammaker, for the Government.**

U. W. Hammaker, being duly sworn on the part of the Government, testified in substance as follows:

"That on the 10th day of November, 1921, he was the duly appointed, qualified and acting sheriff of Chouteau County, Montana, that on the night of November 9th, between the hours of 11 and 12:30 o'clock in the night, he and his deputy, George Campbell, had been [16] waiting on the highway about one mile north of the station of Virgille. Chouteau County, Montana; they intercepted the defendants as they were proceeding along the highway in an automobile, that they halted them with firearms, and commanded them to leave their car, that Mr. McGrew, appeared to be sick and asked for some coffee, whereupon he replied, 'We have no coffee,' and McGrew stated 'We have some in the car,' and asked me to get it for him, and I told Campbell to get it; he looked in the back of the car and could not find it, and when he came out I asked him what they had in the car and he replied, 'It is loaded with whiskey, we got it in Canada.' (Here counsel for defendants 'objected to any evidence from the witness as to what he found in the



(Testimony of U. W. Hammaker.)

car, for the reason that it had been wrongfully and unlawfully obtained, he not having has a search-warrant or any warrant for the arrest of defendants,' which said objection was by the Court overruled. And defendants duly excepted.)

"Upon being asked if he had tasted any of the liquor he replied, 'No, but I think that Mr. Campbell drank some of it'; he here identified some bottles of liquid as being some of the bottles taken from defendants' car." These bottles were usual whiskey bottles and labeled accordingly, and were admitted in evidence.

Upon cross-examination, the testimony was substantially as follows:

Q. How and why did you arrest these defendants?

A. We were looking for some casings that had been stolen from a garage.

By the COURT.—What cases?

A. Casings, auto tires.

Q. Was that any reason for arresting these gentlemen?

A. We thought that they might have the casings.

Q. Did you know these defendants?      A. No.

Q. Then why did you stop them on the highway? [17]

A. We had reason to believe that they might have them.

(Testimony of U. W. Hammaker.)

Q. When you stopped defendants did you compel them to stop?

A. I told them we were officers, and asked them where they were going. McGrew replied "We are going home."

Q. Did you have any firearms?

A. I had a rifle.

Q. Did you level it at the defendants?

A. I did not exactly aim it at them.

Q. As a matter of fact, Mr. Hammaker, you stopped their progress by placing your car in the road, and covering them with guns and compelled them to leave their car, and search their person, did you not?

A. I asked them to get out in the light so as to see who they were.

Q. Did you search their person?

A. When McGrew got in the light I saw a gun in his belt, and told Mr. Campbell to get it.

Q. When you made this arrest you were acting under instructions of the Federal Prohibition officers, were you not?

A. No. They had not told me to arrest these defendants.

Q. But you had been in communication with the Federal Prohibition Law enforcement office at Great Falls and Helena, and they had told you to go ahead and make such arrests and if you were unsuccessful in the prosecution of them in the State

(Testimony of U. W. Hammaker.)

Courts, they would prosecute them in the Federal Courts, did you not?

A. They did not. I had some talk with Holter and he *said was* legitimate to stop and search a car without a warrant. I had no instructions from Federal officers to do so.

Q. As a matter of fact, Mr. Hammaker, you were ordered by the [18] District Court to return and redeliver this property to these defendants, on December 12th, last, were you not? A. Yes.

Q. Did you comply with that order, and why not?

A. Well, it was in possession of the Federal agents.

Q. (By the COURT). Did you return the property to the possession of these defendants?

A. Well, I went to Mr. Kaveney's office, to tell them that they had been released, Mr. Groff told them that he had seized it.

Q. (By the COURT.) Was Mr. Groff with you?

A. Yes, he was there.

Q. (By the COURT.) Did he go there with you?

A. Yes.

Q. You knew that the Court had made the order directing that it be returned and redelivered by you? A. Yes.

Q. But you did not comply with it?

A. It had been seized by the Federal authorities.

Q. As a matter of fact, you had *communicate* with the Federal authorities and asked them to have

(Testimony of U. W. Hammaker.)

a man there at the time that the case was dismissed, to seize this property, and these defendants, did you not? A. No. I don't think that I did.

Q. But you had an officer there at each hearing in the District Court to seize them, in the event that the District Court should release them, did you not?

A. There was a man there at each hearing.

Here counsel for defendants moved to strike out the testimony of the witness and the whole of it, for the reason that it had been wrongfully and unlawfully obtained, the arrest having [19] been made in the night-time without a warrant, and that said seizure was unlawful, and without authority, and that all information was unlawfully secured. Which said motion was by the Court denied, and defendants duly excepted.

### **Testimony of George Campbell, for the Government.**

GEORGE CAMPBELL, being duly sworn to testify on the part of the Government, testified in substance as follows:

“That he was a duly appointed, qualified and acting deputy sheriff of Chouteau County, Montana, on the 10th day of November, 1921, and that said arrest occurred at about 2 o'clock in the morning of November 10th; that he tasted liquor from a bottle that the defendants had with them and that it was whiskey, and upon being shown one of the bottles exhibited, stated that it looked like the bottles taken from the defendants, and that he



looked into the contents of the car, and told Mr. Hammaker that it was liquor."

Here the Government rested.

Whereupon the defense rested, and by counsel made the following motion.

"We move the Court to dismiss said action, for the reason that there is not sufficient evidence before the jury to sustain a verdict of guilty, the liquor not having been introduced in evidence, and for the reason that the evidence, and all of it has been unlawfully and illegally secured, in contravention of the constitutional rights of these defendants." Whereupon the Court ruled that the evidence was not sufficient, but permitted the Government to reopen the case and to introduce the liquor in evidence. To which ruling the defendants duly excepted. [20]

Here the Government reopened their case, recalled Mr. Hammaker, and showing him a bottle, sealed with his name upon it (exhibits bottle to witness) asked him what it was, and he replied, "That is one of the bottles taken from the car of the defendants"; upon being asked what the writing on it was, stated, "That is my name placed there by myself for the purpose of identification." The bottle was then introduced in evidence, to which defendants objected, on the ground that it had been unlawfully secured by reason of an unwarranted search and seizure, the same having been made without a search-warrant, or any warrant, in contravention of the constitutional rights of these defendants. Which said objection was by the Court overruled, and defendants duly excepted.

The jury, thereupon returned a verdict of guilty, as charged, and the Court imposed a joint fine of (\$300.00) Three Hundred Dollars.

That said defendants having claimed error of the Court, in denying said petition of defendants; and in permitting the testimony of the sheriff to be introduced; and in permitting the reopening of the case after the same had been closed; and in permitting the liquor to be introduced in evidence, the same having been unlawfully and unwarrantedly seized; and in refusing to dismiss said action for failure of the evidence; and in permitting the jury to return a verdict upon the evidence thus offered; and in entering judgment upon the verdict, and having excepted to each of said rulings, and because the matters and things heard and considered in the premises, are not made manifest by the records in said action, this bill of exceptions is made and presented in order to preserve a true and correct record of said matter.

J. A. KAVANEY,  
Attorney for Defendants.

Dated at Fort Benton, Montana, December 30th,  
1921. [21]

---

**Certificate of Judge to Bill of Exceptions.**

State of Montana,  
County of Lewis and Clark,—ss.

I, George M. Bourquin, the Judge of the United States District Court, for the District of Montana, Division of Great Falls, do hereby certify that I am the Judge before whom the proceedings

had in the above-entitled matter was heard, and the petition of the above-named defendants was presented.

That the foregoing, as by me corrected to conform to facts and my minutes of the evidence, consists of a full, true and correct bill of exceptions of said petition and proceedings had in said matter, and the rulings and denials thereof, and that the same contains all matters and things considered therein, and that this bill of exceptions was presented in due season, and is hereby settled, allowed and signed as a fair and full, true and correct bill of exceptions on said petition and the denial thereof, and the proceedings thereafter had and the rulings thereon.

WITNESS my hand this 20th day of February,  
A. D. 1922.

BOURQUIN,  
Judge of the United States District Court. [22]

---

In the District Court of the United States of  
America for the District of Montana.

THE UNITED STATES OF AMERICA,  
Plaintiff,

vs.

MURRAY L. McGREW and FRANK L. BOYD,  
Defendants.

**Affidavit of J. A. Kavaney of Mailing of Bill of  
Exceptions.**

State of Montana,  
County of Chouteau,—ss.

J. A. Kavaney, being first duly sworn, on his oath deposes and says that he is the attorney for the defendants in the above-entitled action.

That on the 30th day of December, A. D. 1921, he duly deposited in the United States Postoffice at Fort Benton, Montana, a copy of the proposed bill of exceptions, hereto attached, in an envelope duly sealed, and with sufficient postage thereto attached, and said envelope being addressed to the United States District Attorney, at Helena, Montana.

That at said time there was a regular communication by mail between the Cities of Fort Benton, Montana, and Helena, Montana.

Further affiant sayeth not.

J. A. KAVANEY.

Subscribed and sworn to before me this 30th day of December, A. D. 1921.

[Seal]

H. S. MCGINLEY,  
Notary Public for the State of Montana, Residing  
at Fort Benton, Montana.

My commission expires December 5th, 1922.

Filed Feb. 20, 1922. C. R. Garlow, Clerk.

---

That on January 9, 1922, petition for writ of error was duly filed herein, being in the words and figures following, to wit: [23]



In the District Court of the United States of  
America for the District of Montana.

AT LAW.

THE UNITED STATES OF AMERICA,

Respondent in Error,

vs.

MURRAY L. MCGREW and FRANK L. BOYD,

Appellants in Error.

**Petition for Writ of Error.**

Comes now the defendants Murray L. McGrew and Frank L. Boyd, and says that on the twentieth day of December, A. D. 1921, judgment in this case was entered by this court in favor of the plaintiff and against these defendants, by which said judgment defendants were aggrieved, in that in said judgment and the proceedings had prior thereto in this case certain errors were committed to the prejudice of these defendants, all of which will appear more in detail from the assignment of errors filed with this petition.

WHEREFORE defendants pray that a writ of error may issue to the United States Circuit Court of Appeals for the Ninth Circuit for the correction of the errors complained of, and that a duly authenticated transcript of the record, proceedings and papers herein may be sent to said Circuit Court of Appeals.

Dated January fifth, A. D. 1922.

J. A. KAVANEY,

Attorney for Defendants.

Filed Jan. 9, 1922. C. R. Garlow, Clerk.

---

That on January 9, 1922, assignment of errors was duly filed herein, being in the words and figures following, to wit: [24]

In the District Court of the United States of  
America for the District of Montana.

THE UNITED STATES OF AMERICA,

Respondent in Error,

vs.

MURRAY L. MCGREW and FRANK L. BOYD,  
Appellants in Error.

**Assignment of Errors.**

State of Montana,  
County of Chouteau,—ss.

J. A. Kavaney, being duly sworn, says that he is the attorney for Murray L. McGrew and Frank L. Boyd, the defendants named in the above-entitled cause; that judgment in said action was rendered in the above-entitled court by the Honorable George M. Bourquin, the Presiding Judge of said Court, on the twentieth day of December, 1921, at the courtroom of said Court, in the City of Great Falls, Montana, finding said defendants guilty as charged, and imposing a fine of Three Hundred (\$300.00) Dollars, and costs, jointly. That

on the seventeenth day of December, 1921, defendants herein filed in said court and cause their duly verified petition for the return of personal property and suppression of the same as evidence, which said petition was by said Court denied. That this deponent is grieved by the erroneous decision of said Judge in said action, in matters of law and procedure, in the proceedings of said Judge in said action, which errors and procedures are as follows, to wit:

1st. That the said Court erred in refusing to grant said petition for return of personal property and suppression of the same as evidence, pages 2, 3, 4, and 5 of said bill of [25] exceptions. Article IV, Amendments to the Constitution of the United States.

2d. That said Court erred in ruling that: "It makes no difference how evidence may have been obtained by a sheriff, even though by wrongful seizure, it is still admissible as evidence in the Federal Court as against the defendants," and upon the further ruling that, "Where liquor is placed in a car and started to move without a permit (the liquor and vehicle, or evidence) becomes forfeited to the Government."

3d. That the Court erred in allowing U. W. Hamaker, sheriff, and George Campbell, deputy sheriff, who made the wrongful seizure, to testify relative to the contents of said car or to give evidence in said case where the information was wrongfully obtained.

4th. The Court erred in refusing to strike out

the evidence of said U. W. Hammaker, for the reason that it was wrongfully and unlawfully obtained, he not having a search-warrant or any warrant for the arrest of said defendants, and evidence being as follows:

“That on the 10th day of November, 1921, he was the duly appointed, qualified and acting sheriff of Chouteau County, Montana; that on the night of November 9th, between the hours of 11:00 and 12:30 o’clock, in the night, he and his Deputy, George Campbell, had been waiting on the highway about one mile north of the station of Virgelle, Chouteau County, Montana, they intercepted the defendants as they were proceeding along the highway in an automobile, that they halted them with firearms, and commanded them to leave their car; that Mr. McGrew appeared to be sick and asked for some coffee, whereupon he replied, ‘We have no coffee,’ and McGrew stated, ‘We have some in the car,’ and asked me to get it for him, and I told Campbell to get it; he looked in the back [26] of the car, and could not find it, and when he came out I asked him ‘What they had in the car’ and he replied, ‘It is loaded with whiskey.’

Upon being asked if he had tasted any of the liquor, he replied, ‘No, but I think that Mr. Campbell drank some of it.’ He here identified some bottles of liquid as being some of the bottles taken from defendants’ car.



Upon cross-examination, the testimony was substantially as follows:

Q. How and why did you arrest these defendants?

A. We were looking for some casings that had been stolen from a garage.

By the COURT.—What cases?

A. Casings, auto tires.

Q. Was that any reason for arresting these defendants?

A. We thought that they might have the casings.

Q. Did you know these defendants?

A. No.

Q. Then why did you stop them on the highway?

A. We had reason to believe that they might have them.

Q. When you stopped defendants did you compel them to stop?

A. I told them we were officers, and asked them where they were going. McGrew replied, 'We are going home.'

Q. Did you have any firearms?

A. I had a rifle.

Q. Did you level it at the defendants?

A. I pointed it at them.

Q. As a matter of fact, Mr. Hammaker, you stopped their progress by placing your car in the road, and covering them with guns and compelled them to leave their car, and searched their person, did you not? [27]

A. I asked them to get out in the light so as to see who they were.

Q. Did you search their persons?

A. When McGrew got in the light I saw a gun in his belt, and told Mr. Campbell to get it.

Q. When you made this arrest you were acting under instructions of the Federal prohibition officers, were you not?

A. No. They had not told me to arrest these defendants.

Q. But you had been in communication with the Federal Prohibition Law Enforcement office at Great Falls, and Helena, and they had told you to go ahead and make such arrests and if you were unsuccessful in the prosecution of them in the State Courts, they would prosecute them in the Federal Courts, did you not?

A. I don't just remember.

Q. Did you not talk to one Benjamin Holter and L. S. Groff, Prohibition Officers of the Federal Courts, about this, and agree that you were to act in consort?

A. We had talked some about it.

Q. As a matter of fact, Mr. Hammaker, you were ordered by the District Court to return and redeliver this property to these defendants, on December 12th last, were you not?

A. Yes.

Q. Did you comply with that order, and why not?

A. Well, it was in the possession of the Federal Agents.

Q. (By the COURT.) Did you return the property to the possession of these defendants?

A. Well, when I went to Mr. Kavaney's office, to tell them that they had been released, Mr. Groff told them that he had seized it.

Q. (By the COURT.) Was Mr. Groff with you? A. Yes, he was there.

Q. (By the COURT.) Did he go there with you? [28] A. Yes.

Q. You knew that the Court had made the order directing that it be returned and redelivered by you? A. Yes.

Q. But you did not comply with it?

A. It had been seized by the Federal authorities.

Q. As a matter of fact, you had communicated with the Federal authorities and asked them to have a man there at the time that the case was dismissed, to seize this property, and these defendants, did you not?

A. No, I don't think that I did.

Q. But you had an officer there at each hearing in the District Court to seize them, in the event that the District Court should release them, did you not?

A. There was a man there at each hearing."

5th. That said Court erred in refusing to grant defendant's motion for a dismissal of said action upon the Government resting its case and defendant's motion: "We move the Court to dismiss said action for the reason that there is not sufficient evidence before the jury to sustain a ver-

dict of guilty, the liquor not having been introduced in evidence, and for the reason that the evidence, and all of it, has been unlawfully and illegally secured, in contravention of the constitutional rights of these defendants," whereupon the Court permitted the Government to reopen said case and introduce the liquor in evidence.

6th. That the Court erred in permitting the introduction of said liquor in evidence, over defendant's objection, "That it had been unlawfully secured by reason of an unwarranted search and seizure, the same having been made without a search-warrant, or any warrant in contravention of the constitutional rights of these [29] defendants."

7th. That said Court erred in permitting said jury to return a verdict of guilty upon the evidence thus introduced.

8th. That said Court erred in entering said verdict and judgment thereon.

WHEREFORE defendants pray that said judgment be reversed and said cause dismissed.

J. A. KAVANEY,  
Attorney for Defendants.

Subscribed and sworn to before me by the said J. A. Kavaney, this 7th day of January, A. D. 1922.

[Seal] H. S. MCGINLEY,  
Notary Public for the State of Montana, Residing  
at Fort Benton, Montana.

My commission expires on the 5th day of December, 1922.

Filed Jan. 9, 1922. C. R. Garlow, Clerk.



That thereafter, on February 20th, 1922, order allowing writ of error was duly filed herein, being in the words and figures following, to wit: [30]

In the District Court of the United States of America for the District of Montana.

THE UNITED STATES OF AMERICA,

Respondent in Error,

vs.

MURRAY L. McGREW and FRANK L. BOYD,

Appellants in Error.

**Order Allowing Writ of Error.**

Desiring to give petitioner an opportunity to test in the United States Circuit Court of Appeals for the Ninth Circuit the questions presented in the foregoing petition,—

IT IS ORDERED, that a writ of error be allowed to said Court, and that the same may be made a supersedeas, the bond in the penal sum of Five Hundred (\$500.00) Dollars herewith being approved.

IN TESTIMONY WHEREOF, witness my hand this 20th day of Feb., A. D. 1922.

BOURQUIN,

Presiding Judge of the United States District Court, for the District of Montana.

Filed Feb. 20, 1922. C. R. Garlow, Clerk.

That thereafter, to wit, on February 23, 1922, citation was duly filed herein, the original citation being hereto annexed and being in the words and figures following, to wit: [31]

In the District Court of the United States of America for the District of Montana.

THE UNITED STATES OF AMERICA,  
Respondent in Error,  
vs.

MURRAY L. MCGREW and FRANK L. BOYD,  
Appellants in Error.

**Citation on Writ of Error.**

To the United States of America, and to the Honorable JOHN L. SLATTERY, United States District Attorney for the District of Montana,  
GREETINGS:

You are hereby cited and admonished to be and appear in the Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, within thirty (30) days from the date hereof, pursuant to a writ of error, filed in the Clerk's office of the District Court of the United States, for the District of Montana, wherein Murray L. McGrew and Frank L. Boyd are appellants in error and you are respondent in error, to show cause, if any there be, why the judgment rendered against the appellants in error as in said writ of error mentioned should

not be corrected, and why speedy justice should not be done to the parties in that behalf.

BOURQUIN,

Judge of the United States District Court, for the  
District of Montana.

Feb. 20, 1922.

Service accepted and copy received this 23d day  
of Feb. 1922.

RONALD HIGGINS,

Asst. U. S. Atty.,

District of Montana. [32]

[Endorsed]: #3943. In the District Court of  
the United States of America for the District of  
Montana. The United States of America, Respond-  
ent in Error, vs. Murray L. McGrew and Frank  
L. Boyd, Appellants in Error. Citation. Filed  
Feb. 23d, 1922. C. R. Garlow, Clerk of the United  
States District Court. [33]

---

Thereafter, to wit, on February 23, 1922, writ of  
error was duly filed herein, the original writ of  
error being hereto annexed and being in the words  
and figures following, to wit: [34]

In the District Court of the United States of  
America, for the District of Montana.

THE UNITED STATES OF AMERICA,

Respondent in Error,

vs.

MURRAY L. MCGREW and FRANK L. BOYD,  
Appellants in Error.

**Writ of Error.**

To the President of the United States, and to the  
Honorable the Judge of the District Court of  
the United States of America, for the District  
of Montana, GREETINGS:

Because in the record and proceedings, as also in the rendition of the judgment of a cause which is in the said District Court before you, between the United States of America, plaintiff, and Murray L. McGrew and Frank L. Boyd, defendants, a manifest error hath happened, to the great damage of the said Murray L. McGrew and Frank L. Boyd, as by their assignment of error appears, we being willing that error, if any hath been should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ so that you have the same in the said United States Circuit Court of Appeals for the Ninth Circuit within thirty (30) days from the date hereof, that the records and proceedings aforesaid [35] being inspected, the said Circuit Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States of Amer-



ica, the 20th day of February, in the year of our Lord one thousand nine hundred twenty-two.

[Seal]

C. R. GARLOW,

Clerk of the United States District Court for the District of Montana.

Allowed by:

---

Service accepted and copy received this 23d day of Feb. 1922.

RONALD HIGGINS,

Asst. U. S. Atty., District of Montana. [36]

---

**Answer of Court to Writ of Error.**

The answer of the Honorable, the District Judge of the United States for the District of Montana, to the foregoing writ:

The record and proceedings whereof mention is within made, with all things touching the same, I certify under the seal of the said District Court of the United States, to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within I am commanded.

By the Court:

[Seal]

C. R. GARLOW,

Clerk.

By H. H. Walker,

Deputy. [36 $\frac{1}{2}$ ]

[Endorsed]: #3943. In the District Court of the United States of America, for the District of Montana. The United States of America, Respondent in Error, vs. Murray L. McGrew and Frank L. Boyd, Appellants in Error. Writ of Error. Filed Feb. 23d, 1922. C. R. Garlow, Clerk of the United States District Court. [37]

---

That on February 20, 1922, supersedeas bond on writ of error was duly filed herein, being in the words and figures following to wit:

In the District Court of the United States of America, in and for the District of Montana.

THE UNITED STATES OF AMERICA,  
Plaintiff,

vs.

MURRAY L. MCGREW and FRANK L. BOYD,  
Defendants.

**Supersedeas Bond on Writ of Error.**

United States of America,  
*United States* District of Montana,—ss.

We, Murray L. McGrew and Frank L. Boyd, residing at Billings, and Martin J. Curtis and Theo. Schultz, residing at Billings, in the State of Montana, acknowledge ourselves to be jointly and severally indebted to the United States of America in the sum of Five Hundred (\$500.00) Dollars, lawful money of the United States of America, to be levied of our goods and chattels, lands and tenements,

upon this condition: That if the said Murray L. McGrew and Frank L. Boyd, the defendants, upon whose application a writ of error has been allowed by the United States Circuit Court of Appeals for the Ninth Circuit and is now pending, shall be and appear at the District Court of the United States for the Great Falls Division, District of Montana, upon the determination of the proceedings on said writ of error, and the receipt and filing of a writ of mandate or other process or certificate showing the disposition thereof by the said Court of Appeals, or, within five days thereafter, to answer and obey whatever final order or judgment except as to costs, shall be made in the premises, and not depart said court without leave thereof, then this recognizance to be void; otherwise to remain in full force and virtue.

MURRAY L. MCGREW. (L. S.)

[Seal] FRANK L. BOYD. (L. S.)

MARTIN J. CURTIS. (L. S.)

THEO. SCHULTZ. (L. S.)

[38]

Taken, acknowledged and subscribed this 7th day of January, A. D. 1922, in open court.

[Seal] RAY ANDERSON,  
United States Commissioner.

United States of America,  
District of Montana,—ss.

Martin J. Curtis, a surety on the annexed recognizance, and Theo. Schultz a surety thereon, being duly sworn, depose and say that Martin J. Curtis

resides at Billings, Montana, and Theo. Schultz resides at Billings, Montana, both in the county of Yellowstone in said district; that they are freeholders in the *county Yellowstone*, District of Montana; that Martin J. Curtis is worth the sum of Two Thousand Dollars and Theo. Schultz is worth the sum of Two Thousand Dollars, over and above all his just debts and liabilities, in property subject to execution and sale, and that his property consists of: Real estate and improvements thereon, located in Billings, Montana, and Custer, Montana, respectively.

(Affiants' signatures:) MARTIN J. CURTIS.  
THEO. SCHULTZ.

Sworn to and subscribed before me this 7th day of  
January, A. D. 1922.

[Seal] RAY ANDERSON,  
United States Commissioner as Aforesaid.

This recognizance approved this 7th day of January, 1922.

[Seal] RAY ANDERSON,  
U. S. Commissioner.

[Indorsed]: No. 3943. Title of Court and Cause.  
Supersedeas Bond on Writ of Error. Filed Feb.  
20, 1922. C. R. Garlow, Clerk. [39]

**Certificate of Clerk U. S. District Court to Transcript  
of Record.**

United States of America,  
District of Montana,—ss.

I, C. R. Garlow, Clerk of the United States Dis-



trict Court in and for the District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 39 pages, numbered consecutively from 1 to 39 inclusive, is a full, true and correct transcript of the record and proceedings had in said cause, and of the whole thereof, required to be incorporated in the record on appeal, as appears from the original records and files of said court in my custody as such clerk; and I do further certify and return that I have annexed to said transcript and included within said pages the original citation and writ of error issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of \$16.25, and have been paid by the plaintiffs in error.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court at Helena, Montana, this 3d day of March, A. D. 1922.

[Seal]

C. R. GARLOW,

Clerk.

By H. H. Walker,

Deputy Clerk. [40]

---

[Endorsed]: No. 3840. United States Circuit Court of Appeals for the Ninth Circuit. Murray L. McGrew and Frank L. Boyd, Plaintiffs in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error

to the United States District Court of the District  
of Montana.

Filed March 6, 1922.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.

**United States  
Circuit Court of Appeals  
for the Ninth Circuit.**

---

May Term A. D. 1922

MURRAY L. McGREW and FRANK L. BOYD,  
Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,  
Defendant in Error.

---

**Brief of Plaintiffs in Error**

---

Upon Writ of Error to the United States District  
Court of the District of Montana.

---

Honorable GEORGE M. BOURQUIN,  
Judge.

J. A. KAVANEY,  
Attorney for Plaintiffs in Error.

JOHN L. SLATTERY, Esq.,  
U. S. Attorney,

RONALD HIGGINS, Esq.,  
Assistant U. S. Attorney,

and W. H. MEIGS, Esq.,  
Assistant U. S. Attorney,

Attorneys for Defendant in Error.

---





## INDEX TO PRINTED BRIEF

	Page
Preliminary Statement .....	1
Statement of Fact .....	2
Evidence .....	5
Specification of Error .....	7
Final Issues .....	9
Points and Authorities .....	9
Argument .....	16
Conclusion .....	26

## INDEX TO CASES CITED

Fitter v. United States, 285 Fed. 567 .....	10-11-21
In Re. Tri-State Coal & Coke Co., 253 Fed. 605.....	10
Weeks v. United States 232 U. S. 652, 34 Sup. Ct. R. 341; L. R. A. 1915 B 834 .....	10-12-17-21
State V. Peterson (Wyo.) 194 Pac. 342 .....	10
State ex rel Samlin v. Dist. Court (Mont.) 198 Pac. 362 .....	10
United States Const, IV Amend .....	11-27
Bram v. United States, 168 U. S. 585.....	11-17
Laughter v. United States, 259 Fed. 94 ...	11-18-22
Veeder v. United States, 252 Fed. 414 .....	11-18-21
United States v. Premises in Butte, Mont 246 Fed. 185 .....	11
United States v. McHie, 194 Fed. 894.....	11-12-22
United States v. Mounday, 208 Fed. 186.....	11-12
Boyd v. United States, 116 U. S. 616 .....	12-17-21
Levy Ct. v. Ringgold, 5 Peters 451, 8 U. S. (L. Ed.) 188 .....	14-24
San Francisco v. United States, 4 Sawy 53; 21 Fed. Cas. No. 12,316 .....	14-24

	Page
8 Opins. Attorney-General 399 .....	14-24
United States v. Morgan, 222 U. S. 274; 33 Sup. Ct. R. 81; 56 (L. Ed.) 198 .....	14
United States v. Stone, 8 Fed. 261 .....	14
United States v. McAvoy, 26 Fed. Cas. No. 15,654 4 Blatchf, 418 .....	15-25
United States v. Doughty, 7 Blatchf, 424; 25 Fed. Cas. No. 14,986 .....	15-25
United States v. Morris, 1 Payne 209; 26 Fed. Cas. No. 15,816; 10 Wheaton 246 .....	15-26
United States v. Abrams, 230 Fed. 313 .....	17-21
Pacific R. R. Cases 115 U. S. 1, 20 (L. Ed.) 319....	20
Union Pac. R. Co. v. Harris, 158 U. S. 326; 39 (L. Ed.) 1003 .....	20
United States v. Friedberg, 233 Fed. 313 .....	21
Adams v. New York, 192 U. S. 585.....	21
Sec. 771 Federal Statutes Ann. ....	24

**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

---

MURRAY L. McGREW and FRANK L. BOYD,  
Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,  
Defendant in Error.

---

**Brief of Plaintiffs in Error**

---

**PRELIMINARY STATEMENT**

The above entitled action was brought by the United States of America, defendant in error, to the United States District Court for the District of Montana, Great Falls division, upon an information charging and accusing plaintiffs in error, with three separate and distinct counts:

First: "Illegally transporting intoxicating liquors without a permit."

Second: "Illegally transporting intoxicating liquors without making a permanent record thereof."

Third: "Wrongfully possessing intoxicating liquors for use in violation of the National Prohibition Act."

On December 20th, 1921, said cause was tried to a jury which resulted in a verdict of "Guilty" and a joint fine of Three Hundred (\$300) Dollars and cost, was therefore imposed upon said defendants, plaintiffs in error here; wherefore application was made to the United States District Court for the District of Montana, for a Writ of Error to review the judgment and record of the case, which writ was by the Honorable George M. Bourquin, Judge of said Court, granted and allowed on the 20th day of February, A. D. 1922, bringing the case to this court for review.

### STATEMENT OF FACT

On the night of November 10th, 1921, at the hour of about two o'clock in the morning, while plaintiffs in error were travelling along the public highway near the station of Vergille, in the County of Chouteau, State of Montana, driving an automobile, they were suddenly confronted by the sheriff of Chouteau County, together with one of his deputies, who after covering them with guns, forced them to stop, leave their car, searched their persons and the contents of their car; finding there a quantity of liquor, the sheriff took said plaintiffs in error in custody, bringing them to the City of Fort Benton and lodged them in the County Jail; all of which was done without warrant of arrest, search warrant, or other process; and the sheriff seized and held the automobile and its contents; on the 10th day of November, 1921 an information was filed in the District



Court of the Twelfth Judicial District of the State of Montana, in and for the County of Chouteau, charging and accusing these plaintiffs in error, defendants there, with the crime of “illegally possessing and transporting intoxicating liquors”; whereupon defendants immediately filed a petition asking for a return of the property so taken, and a suppression of the same as evidence, for the reason that it had been wrongfully seized in violation of their constitutional rights; in violation of Article IV of Amendments of the United States Constitution and Section VII of Article III of the Constitution of the State of Montana; that thereafter and on December 12th, 1921, said information was by the State Court dismissed and the sheriff ordered to “Return and redeliver” the property thus wrongfully taken, to plaintiffs in error; pp. 16 and 17 printed record.

That on the same day at the same time, one L. S. Groff, who was a deputy United States Prohibition Law Enforcement Officer, under appointment from one O. H. P. Shelly, United States Prohibition Law Enforcement Officer for the State of Montana, without warrant of arrest, search warrant or other process, arrested the defendants, plaintiffs in error here, and again lodged them in the County jail at Fort Benton, Montana, seized their car and its contents and held the same in violation of their constitutional rights; all of which was done without complying with the order of the District Court above referred to;

That said defendants, plaintiffs in error here,

were so confined at the County jail at Fort Benton, Montana and their property wrongfully held until December 15th, 1921, when an information was filed in the United States District Court at Great Falls, Montana, by one Ronald Higgins, a deputy United States Attorney, for the District of Montana, (who laid the information in his own name as assistant United States Attorney for the District of Montana. (pp. 2, , and 4 of printed record) charging and accusing these plaintiffs in error with three separate counts:

First: "Illegally transporting intoxicating liquors without a permit."

Second: "Illegally transporting intoxicating liquors without making a permanent record thereof."

Third: "Wrongfully possessing intoxicating liquors for use in violation of the National Prohibition Act."

Which said information was based upon an affidavit of U. W. Hammaker, sheriff of Chouteau County, Montana; (pp. 5 and 6 of printed record.) Wherein he alleges, on the 12th day of December, 1921 that he is still in possession of the liquor thus wrongfully taken, even as against the order of the District Court of the State of Montana.

That on the 17th day of December, 1921, plaintiffs in error were arrested upon a bench warrant issued out of the United States District Court for the District of Montana and said property taken in charge by the United States Marshall without

a search warrant; that on the said 17th day of December, 1921, plaintiffs in error filed with the United States District Court for the District of Montana, Great Falls Division, their duly verified petition in writing, asking for the return and redelivery of said property for the reason that it had been wrongfully seized in violation of their constitutional rights; (pp. 12, 13, 14, 15, 16 and 17 of printed record).

That thereafter and on December 20th, 1921, said cause came on for hearing before said United States District Court for the District of Montana, Great Falls Division, and after a jury had been duly impanelled and sworn to try the case, the Court proceeded to hear said petition and the proof offered thereon; that said petition was denied and upon trial of the issue a verdict of "Guilty" was returned (p. 8 printed record) and judgment thereupon entered, finding said plaintiffs in error the sum of Three Hundred (\$300) Dollars and cost, (pp. 9 and 10 of printed record).

## EVIDENCE

### I. EVIDENCE OF WRONGFUL ARREST ON THE PART OF THE SHERIFF OF CHOUTEAU COUNTY, MONTANA.

On trial of the issue the evidence showed that the arrest as made by the sheriff of Chouteau County, Montana was illegal, having been made without warrant or arrest or warrant to search, and upon dismissal of the case on December 12th, 1921 the District Court of the Twelfth Judicial

District for the State of Montana, wherein said action was pending, ordered a "Return and re-delivery" of the property so taken. (Bottom of page 16, top of page 17, printed record).

## II. EVIDENCE OF WRONGFUL ARREST AND SEIZURE ON THE PART OF THE FEDERAL OFFICER.

The evidence showed that the arrest and seizure on the part of L. S. Groff, deputy United States prohibition law enforcement officer, was made without warrant of arrest, or search, without any authority whatsoever, and in violation of the order of the State Court, and in violation of the constitutional rights of the plaintiffs in error, (petition of plaintiffs in error, page 14; testimony of U. W. Hammaker, page 21 printed record).

## III. EVIDENCE OF COLLUSION BETWEEN FEDERAL, STATE AND OFFICERS.

The allegation of the petition of plaintiffs in error (on page 14 of written transcript) is substantiated and the evidence of U. W. Hammaker (on page 20) tends to prove the allegation of collusion between the sheriff and Federal prohibition officers (pp. 20, 21, 22, printed record). The evidence showed a concerted action between the sheriff and Federal prohibition officers throughout the period of prosecution in the State Court as well as in the Federal Court, at the conclusion of Mr. Hammaker's testimony, showing that a Federal Officer was present at each hearing and the admission on his part that he had com-



municated with them. (Top of page 21, printed record).

## SPECIFICATIONS OF ERROR

### I.

That the said Court erred in refusing to grant said petition for return of personal property and suppression of the same as evidence. (pp. 2, 3, 4 and 5 of said Bill of Exceptions), Article IV, Amendments to the Constitution of the United States).

### II.

That the said Court erred in ruling that: "It makes no difference how evidence may have been obtained by a sheriff even though by wrongful seizure, it is still admissible as evidence in the Federal Court as against the defendants". and upon further ruling that "Where liquor is placed in a car and started to move, without a permit (the liquor and vehicle, or evidence) becomes forfeited to the Government."

### III.

That the Court erred in allowing U. W. Hamaker, Sheriff and George Campbell, Deputy Sheriff, who made the wrongful seizure, to testify relative to the contents of said car or to give evidence in said case where the information was wrongfully obtained.

### IV.

The Court erred in refusing to strike out the evidence of said U. W. Hamaker for the reason that it was wrongfully obtained, he not having a search warrant or any warrant for the arrest of

said defendants, and evidence being as follows: (pp. 30, 31, 32 and 33, printed record).

V.

That said Court erred in refusing to grant defendants motion for a dismissal of said action upon the Government resting its case. Defendant's motion: "We move the Court to dismiss said action for the reason that there is not sufficient evidence before the jury to sustain a verdict of "Guilty", the liquor not having been introduced in evidence, and for the reason that the evidence, and all of it, has been unlawfully and illegally secured in contravention of the constitutional rights of these defendants", whereupon the Court permitted the Government to reopen said case and introduce the liquor in evidence.

VI.

That the Court erred in permitting the introduction of said liquor in evidence over defendant's objection "That the evidence had been unlawfully secured by reason of the unwarranted search and seizure, the same having been made without search warrant or any warrant in contravention to the constitutional rights of these defendants."

VII.

That the Court erred in permitting said jury to return a verdict of "Guilty" upon the evidence thus introduced.

VIII.

That said Court erred in entering said verdict on judgment thereon.

## FINAL ISSUES

The above errors may be grouped for the purpose of simplifying the argument, into four fundamental questions which therefore become the main issues in the case.

THUS: ERRORS I, III, IV and VI become ISSUE I.

Was the immunity from unreasonable searches and seizures afforded by U. S. Constitution, 4th Amendment, violated where the Court refuses the accused's reasonable application for the return of his property seized by a Federal Officer without process? Is the admission of the same as evidence reversible error?

ERROR II becomes ISSUE II.

Is evidence secured in any manner by a sheriff, admissible in a Federal Court?

ERRORS V and VII rest upon ISSUE III.

Is it proper for the trial Court to permit the prosecution to reopen the case after the defendants have rested to introduce testimony to make a case, and allow the same to go to the jury?

ERROR VIII becomes ISSUE IV.

Are the pleadings sufficient to sustain a verdict and judgment, where the information is layed by an assistant District Attorney in his own name?

## POINTS AND AUTHORITIES

### ISSUE I.

THE HONORABLE UNITED STATES DISTRICT COURT FOR THE STATE OF MONTANA  
ERRED IN DETERMINING THAT THERE HAD

BEEN NO VIOLATION OF THE CONSTITUTIONAL RIGHTS OF THE PLAINTIFFS IN ERROR WHERE THE SEIZURE WAS MADE BY A FEDERAL OFFICER WITHOUT PROCESS (p. 21 printed record.)

Point I.

It adjudicated the case upon the theory, that only one seizure had been made and that by the sheriff of the State Court; whereas plaintiffs in error had recovered from this seizure and the same had been resealed by a Federal Officer without warrant. (p. 21 printed record).

Fitter vs. United States, 285 Federal 567;

In Re. Tri-State Coal and Coke Company,  
253 Fed. 605;

Weeks vs. United States, 232 United States  
652;

34 Supreme Court Reporter, 341;

LRA 1915 B 834;

State vs. Peterson (Wyo.), 194 Pac. 342;

State ex rel Samlin vs. District Court  
(Mont.), 198 Pac. 362.

Point 2.

It adjudicated the matter upon the theory that the seizure by the Federal Officer without warrant or authority was not a violation of the constitutional rights of the plaintiffs in error, the same having been seized from the sheriff, who was holding the property subject to the orders of the State Court and therefore could not consent to a seizure.



United States Constitution IV Amendment;  
Bram vs. United States, 168 United States  
585;

Laughter vs. United States, 259 Fed. 94;

Veider vs. United States, 252 Fed. 414;

United States vs. Premises in Butte, Mon-  
tana, 246 Federal, 185;

Fitter vs. United States, 285 Fed. 267.

### Point 3.

The seizure by L. S. Groff was unlawful and not based upon the information in this case; having been made on December 12th, 1921 (p. 21 of printed record) while the information was not filed until December 15th, 1921 (p. 4 printed record).

United States vs. McHie, 194 Fed. 894, where the Court erred: Where an arrest of one alleged to have been operating a bucket shop was made without warrant because of the absence of a marshall or deputy marshall: seizure of personal property made at the same time was therefore illegal.

United States vs. Mounday, 208 Fed. 186.

“Where a marshall in going to arrest defendants for misuse of mails, was accompanied by certain inspectors who, without a warrant, remained after the arrest and took possession of the defendant’s books, papers and documents, found in their office and carried them away, the inspectors were guilty of unreasonable search and seizure in violation of the Constitutional Amendment—Article IV.”

Point 4.

The admission in evidence of property wrongfully seized is reversible error.

Weeks vs. United States, Supra;

Boyd vs. United States, 116 U. S. 616.

ISSUE II.

THE HONORABLE UNITED STATES DISTRICT COURT FOR THE STATE OF MONTANA, ERRED IN HOLDING THAT "IT IS IMMATERIAL IN WHAT MANNER A SHERIFF MAY HAVE SECURED POSSESSION OF THE EVIDENCE, THE SAME IS ADMISSIBLE IN THE FEDERAL COURT."

Point I.

For in the case at bar the property though wrongfully seized by a Federal Officer and held in violation of the constitutional rights of the plaintiffs in error (p. 21 of printed record) was the property introduced and to which the sheriff testified.

United States vs. McHie, Supra;

United States vs. Mounday, Supra;

Weeks vs. United States, Supra.

ISSUE III.

THE HONORABLE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, ERRED IN PERMITTING THE PROSECUTION TO REOPEN ITS CASE AFTER THE DEFENDANTS HAD RESTED AND TO INTRODUCE THE LIQUOR IN EVIDENCE, AND AL-

## LOWING THE SHERIFF TO TESTIFY AS TO THE CONTENTS OF THE BOTTLE.

### Point I.

(A) For the reason that the sheriff did not know what the bottle contained (p. 19 printed record).

(B) For the reason that there was no evidence that the bottle as introduced in evidence contained liquor.

### ISSUE IV.

THE HONORABLE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, ERRED IN ENTERING THE VERDICT OF THE JURY AS RETURNED AND JUDGMENT THEREON.

### Point I.

(A) For the reason that the information as laid is made in the name of Ronald Higgins, Assistant United States District Attorney, in his own name, he not being a prosecuting officer recognized by law.

## POWERS, DUTIES AND LIABILITIES OF THE UNITED STATES DISTRICT ATTORNEYS.

Section 771 Federal Statutes, Annotated.

“It shall be the duty of every District Attorney to prosecute, in his district, all delinquents for crimes, and offences, cognizable under the authority of the United States, and all civil actions in which the United States are concerned, and, unless otherwise instructed by the Secretary of the

Treasury, to appear in behalf of the defendants in all suits or proceedings pending in his district against collectors or other officers of the revenue, for any act done by them, or for the recovery of any money exacted by, or paid to such officers, and by them paid into the treasury."

Levy Ct. vs. Ringgold;

5 Peters 451, 8 United States L. Ed. 188.

Holding: "The District Attorney derives his authority from acts of Congress and not from the laws of any State, and his rights and duties are to be collected from those acts."

San Francisco vs. United States, 4 Sawy 53,  
21 Fed. Case No. 12,316 at page 371.

"The District Attorney is the regular officer of the government, having charge of all its legal proceedings within his district, subject only to the direction and supervision of the Attorney-General. When other Counsel are employed for these proceedings it is to aid him in their management, not to assume his authority or direct his conduct."

8 Opins, Attorney-General 399.

"It is the official duty of the District Attorney to appear in all cases in which the United States shall be concerned, whether the case stands in the name of the United States or some officer of the United States."

United States vs. Morgan, 222 United States  
274; 33 Supreme Court 81, 56 L. Ed. 198;

United States vs. Stone, 8 Fed. 261.

"Under our Federal Statute from the earliest times and by force of the Statute, the District At-



torney is the only prosecutor known to our law—no private prosecutor has ever been recognized.”

United States vs. McAvoy, 26 Fed. Case No. 15,654 4 Blatchf, 418.

(B) The information is fatally defective, it not having been filed by the District Attorney or by someone in his name.

“Under this Statute it has always been held by the Federal States in this District that there is no power conferred on them, by statute or usage, to recognize a suit, civil or criminal, as legally before them in the name of the United States, unless it is instituted and prosecuted by the District Attorney legally appointed and commissioned conformably to the Statute.”

United States vs. Doughty, 7 Blatchf, 424; 25

The Court saying: “This Court can recognize the United States as a plaintiff on the record only when the record shows that the United States appears as plaintiff by the District Attorney of this district. It is a good ground of demurrer that an action in behalf of the United States is prosecuted in the name of an attorney, not the District Attorney, to whom is exclusively confined the conduct of the actions in which the Government is interested.”

United States vs. Morris, 1 Payne, 209;  
26 Federal cas. No. 15,816, Affirm 10 Wheaton 246; 6 U. S. (L. Ed.) 314.

## ARGUMENT

### ISSUE I.

THE HONORABLE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, ERRED IN DETERMINING THAT THERE HAD BEEN NO VIOLATION OF THE CONSTITUTIONAL RIGHTS OF THE PLAINTIFFS IN ERROR, WHERE THE SEIZURE WAS MADE BY A FEDERAL OFFICER WITHOUT PROCESS. (p. 21 printed record).

#### Point I.

It adjudicated the case upon the theory that only one seizure had been made and that by the sheriff of the State Court; whereas plaintiffs in error had recovered from this seizure and the same had been resealed by a federal officer without warrant. (p. 21 printed record).

(1) It held that the property in the possession of the sheriff as agent of the federal officer, Groff, was in the possession of the original seizure, and

(2) It admitted the testimony of the sheriff with reference to the seizure and possession of the liquor without inquiring as to the authority by which he was holding the same. The record shows (pp. 16 and 17) that the sheriff had lost possession of the property by reason of the seizure made by himself and was holding the same for one L. S. Groff, who had made a seizure without process (p. 21 printed record). Groff was a federal officer without authority.

This brings the case within the purview of the decision in

Weeks vs. United States, 232 U. S. 652, 34

Sup. Ct. R., 32, LRA 1915, B 834;

Boyd vs. United States, 116 U. S. 616;

United States vs. Abrams, 230 Fed. 313;

Bram vs. United States 168, U. S. 532, at p. 542; 42 (L. Ed.) 568.

### Point 2

It adjudicated the matter upon the theory that the seizure by the federal officer without warrant or authority was not a violation of the constitutional rights of the plaintiffs in error, the same having been seized from the sheriff, who was holding the property subject to the orders of the State Court and therefore could not consent to a seizure.

(1) It held that "It makes no difference in what manner a sheriff may come into possession of evidence, the same is admissible in the Federal Court, and that where liquor is placed in a car and started to move it becomes forfeited to the government under the Revenue Law.

(A) For the reason that the tax had not been paid upon the same.

(B) For the reason that it is unlawful to have the same in possession without a permit.

This cannot enter into the determination of this matter.

(1) For the reason that the violation of the constitutional rights of the plaintiffs in error was raised by a petition before trial of the issue.

(2) For the reason that the seizure of the Federal Officer, L. S. Groff, took it out of the category of cases relied upon as an authority in the decision of the Court; in that without permitting the sheriff to comply with the order of the State Court, the federal officer had seized the same in violation of the Court's order without right or authority for so doing. To permit such a practice would be to outwit the law and defeat a party's rights by a violation of the constitution of greater magnitude than the one for which the prosecution was had.

Laughter vs. United States, 259 Fed. 94;

Veider vs. United States, 252 Fed. 414.

Where the Court said: "One's person and property must be entitled in an orderly democracy, to protection against mob hysteria and the oppression of the agents whom the people have chosen to represent them in the administration of the laws which are required to operate on all alike. One's home and place of business are not to be invaded forcibly and searched by the curious and suspicious; not even by a disinterested officer of the law, unless he be armed with a search warrant.

We can not concede that where property has been seized by a sheriff in violation of the constitutional rights of a party, it is still admissible in evidence.

For the reason that this would make it possible to defeat the constitutional rights of any defendant, and that was not the intention of the framers of the constitution when Amendment IV was



drawn. The sheriff of a State is an officer under the constitution and amenable to its provision for the reason; that had the case in the State Court been prosecuted to a determination and the petition of the plaintiffs in error denied, and had the decision of the District Court in that instance been affirmed by the Supreme Court of the State of Montana, an appeal to the United States Supreme Court would have raised the question as thoroughly and the United States Supreme Court would have passed upon the constitutionality of the question the same as if it had been raised in the Federal Court.

“A final judgment or decree in any suit in the highest court of a State in which a decision in a suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity, or where is drawn in question the validity of a statute or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, or immunity is claimed under the constitution, or any treaty or statute of, or commission held, or authority exercised under the United States, and the decision is against the title, right, privilege or immunity, especially set up or claimed, by either party under such constitution treaty, statute, commission, or authority, may be re-examined and reversed or affirmed in the Supreme Court upon a

writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a Court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State Court, and may at their discretion award execution or remand the same to the Court from which it was removed by the writ.

(A) It is so held by the following cases:

Pac. R. R. Case 115 U. S. 1, 20 (L. Ed.) 319;  
Union Pacific R. Co. vs. Harris, 158 U. S.  
326, 39 (L. Ed.) 1003.

It is well established that where a suit is brought in a State Court and a Federal question is presented the defendant may permit the case to go to judgment and take his appeal to the Supreme Court of his State and, if the decision of the court is against the Federal right for which he contends, he may then sue out a writ of error to the Supreme Court of the United States and present the question before that tribunal. The case comes before that Court presenting exactly the same question as would be presented if the defendant had taken the other course—had petitioned for the removal of the Federal Court, and had carried the case to the Supreme Court of the United States by way of appeal or writ of error from the Federal Court.

Therefore, where the sheriff had made a seizure in violation of the rights of the plaintiffs in error and they having raised the question by petition in the State Court and that Court having ordered a return of the property the Federal Court can

not be heard to say that they will not be bound by the constitution by reason of the fact that the sheriff is not an officer of that Court.

Point 3.

The seizure by L. S. Groff was unlawful and not based upon the information in this case; having been made on December 12th, 1921, (p. 21 printed record) while the information was not filed until December 15th, 1921. (p. 4 printed record).

Granting that the Court's ruling was correct, which we do not admit, the seizure by L. S. Groff took the case out of the category of cases upon which the Court relied as authority for its decision.

For the reason that the seizure was made by a Federal officer without authority, and the petition of the plaintiffs in error, which was made timely, raised the question of the admissibility of the same in evidence, and

While the prosecution apparently attempted to avoid the consequences by calling the sheriff to testify, the introduction of the liquor in evidence is reversible error.

United States vs. Friedberg, 233 Fed., 313;

Fitter vs. United States, 258 Fed. 567;

Veider vs. United States, 252 Fed. 414;

United States vs. Abrams, 230 Fed. 313;

Adams vs. New York, 192 U. S. 585;

Boyd vs. United States. 116 U. S. 616;

Weeks vs. United States, 232 U. S. 652 Sup.

Ct. R. 34 Sup. Ct. R. 341 LRA 1915 B 834.

## ISSUE II.

THE HONORABLE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA ERRED IN HOLDING THAT IT IS IMMATERIAL IN WHAT MANNER A SHERIFF MAY HAVE SECURED POSSESSION OF THE EVIDENCE, THE SAME IS ADMISSIBLE IN THE FEDERAL COURT.

### Point 1.

For in the case at bar the property though wrongfully seized by a federal officer and held in violation of the constitutional rights of the plaintiffs in error (p. 21 printed record) was the property introduced in evidence and to which the sheriff testified.

While the plaintiffs in error here would have been justified in seizing by force the property from the sheriff after December 12th, 1921 and in resisting the seizure by L. S. Groff, the federal officer who made the seizure as testified to by the sheriff (p. 21 printed record) they have followed the lawful course in protecting their interests and their constitutional rights by petition addressed to the Court asking for a return of the property seized.

Laughter vs. United States, Supra;  
United States vs. McHie, Supra.

## ISSUE III.

THE HONORABLE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, ERRED IN PERMITTING THE PROSE-



CUTION TO REOPEN ITS CASE AFTER THE DEFENDANT HAD RESED AND TO INTRODUCE THE LIQUOR IN EVIDENCE, AND ALLOWING THE SHERIFF TO TESTIFY AS TO THE CONTENTS OF THE BOTTLE.

Point 1.

(A) For the reason that the sheriff did not know what the bottle contained (p. 19, printed record).

(B) For the reason that there was no evidence that the bottle contained liquor.

There is no authority in law for the reopening of a case after the same has been closed, to allow the introduction of evidence to make a case, and

It is only through the discretion of the Court that the case may be reopened, and the introduction of the property wrongfully seized is not a matter discretionary with the Court, and

To allow the prosecution to reopen in order to make a case is an abuse of discretion.

ISSUE IV.

THE HONORABLE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, ERRED IN ENTERING THE VERDICT OF THE JURY AS RETURNED AND JUDGMENT THEREON.

Point 1.

(A) For the reason that the information as laid is in the name of Ronald Higgins, assistant United States District Attorney, in his own name,

he not being prosecuting officer recognized by law.

Section 771 Federal Statutes, Ann. provides that all prosecutions for delinquents in crimes and offences cognizable under the authority of the United States must be brought by the District Attorney, and

There is no authority in law by which the assistant United States District Attorney may bring an action in his name, but only in the name of his principal who is commissioned by law for that purpose.

Levy Ct. vs. Ringgold, 5 Peters, 451, 8 U. S. (L. Ed.) 188;

Holding: "The District Attorney derives his authority from the acts of Congress and not from the laws of any State and his rights and duties are to be collected from those acts."

San Francisco vs. United States, 4 Sawy. 53, 21 Fed. Cas. No. 12,316, at page 371.

A deputy or assistant in any office acts wholly upon the authority of his principal in his, the principal's name and any action taken upon his own authority is invalid in law. "The district attorney is the regular officer of the government, having charge of all its legal proceedings within his district, subject only to the direction and supervision of the Attorney-General. When other counsel are employed in these proceedings it is to aid him in their management, not to assume his authority or direct his conduct."

8 Opins., Attorney-General, 399.

Assistant United States District Attorneys are not appointed independently of the creation of the District Attorney's office but are only additional help provided to take care of the work of such office and to assist the District Attorney in the care of surplus business and their number is governed by the amount of litigation handled in the particular district.

It is the official duty of the District Attorney to appear in all cases in which the United States shall be concerned, whether the case stands in the name of the United States or some officer of the United States.

In the case—*The United States vs. McAvoy*, 26 Fed. Case No. 15,654, 4 Blatchf, 418, the Court said "Under our Federal Statutes from the earliest times and by force of the Statute the District Attorney is the only prosecutor known to our law—no private prosecutor has ever been recognized." Then, where a prosecution is brought by an assistant United States District Attorney in his own name, he not being recognized as a prosecuting officer other than as representing the District Attorney, the information is insufficient in form to give the District Court jurisdiction or to sustain a verdict and judgment thereon.

(B) The information is fatally defective in not having been filed by the District Attorney, or someone in his name.

In the case of—*United States vs. Doughty*, 7 Blatchf, 424, 25 Fed. Case No. 14,986, where the Court in dismissing a bill in equity which did not

state, in the body of it, that the United States brought it by the District Attorney but merely that they brought it against the defendant at the relation of the relators; the Court said "This Court can recognize the United States as a plaintiff on the record only when the record shows that the United States appears as plaintiff by the District Attorney of this district."

United States vs. Morris, 1 Payne, 209, 26  
Fed. Cas. No. 15,816, Affirmed 10 Wheat-  
ton 246, 6 U. S. (L. Ed.) 314.

## CONCLUSION

We submit that the judgment of the Honorable United States District Court brought here for review is a most unrighteous one; it is not based upon the law, and it is a denial of the constitutional rights of plaintiffs in error.

The evidence upon trial of the issue proves conclusively the allegations of the plaintiffs' petition for return of the property, (pp. 12 to 16 incl. printed record) that the seizure by the sheriff had been annulled by the order of the State District Court and he being unable longer to hold the property, a seizure was made by L. S. Groff, United States Deputy Prohibition Law Enforcement Officer, in order that the property might be held and introduced in the Federal Court. The Court itself did not recognize the seizure made by L. S. Groff for the reason that it was made without authority; upon the evidence of U. W. Hammaker, (p. 21 printed record), the Court should have immediate-



ly directed a verdict for the defendants and ordered the property returned. The case is identical to the case of *Weeks vs. United States*, cited above, in that the seizure by both the sheriff and federal officer was wrongful and the property thus introduced in evidence was an improper exhibit. The mere fact that a sheriff was called to testify instead of the federal officer can not be held to take the case out of the purview of the former decisions upon questions of like nature. We submit that had the sheriff held the property under his original seizure and introduced the same in evidence there could then be found some authorities holding that it was admissible, although we do not believe that the best authorities can follow that line of decisions; for clearly had the issue been brought up in the State Court. The fact that the violation of the United States Constitution had been perpetrated by the sheriff and not a federal officer, would not change the decision of the Supreme Court and the same would be held a violation of the constitutional rights of the plaintiffs in error.

The wording of Article IV of the Amendments to the Constitution is unequivocal and the declaration includes all who act under the authority of any law, whether State or Federal. "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly de-

scribing the place to be searched, and the person or things to be seized.”

Clearly, there is no language here which can be interpreted to mean that this applies only to federal officers, the declaration guarantees the security of the citizen from any, and all, unlawful searches and seizures, whether perpetrated by a federal officer, State officer or municipal officer, it is nevertheless, an unlawful search and seizure which the Court, sworn to defend the constitution, can not pass unchallenged.

If this decision should be set down as a precedent to be followed in the future, it can not but tend to force the citizen to protect his rights by force instead of abiding the decision of the Courts, and the highest duty that a Court is called upon to perform, is that, in upholding the letter of the constitution. The cause from which resulted the very heart of the section of the constitution here called in question, came about through the officers of the peace continually reaching out under their authority and abusing that authority, until the people in their might, rose up and wrung from King John, the great Magna Charta, on the field of Runny Mead;

Therefore, the Courts must most jealously guard these provisions of the constitution, and to protect the rights of the citizen from the ever-extended efforts of the man clothed with the authority to enforce the law.

Surely, it was not the intention of the Courts in their prior decision on this line, to grant that

the Federal and State officers, by conspiring together, might outwit the law, and the constitution to strip the citizen of his rights before the Court. If this be the final decision in such a case, there is nothing to prevent an over-zealous sheriff from thoroughly defeating the most sacred right of a citizen by an unwarranted search and seizure of his property under color of his authority in the office he holds and turning them over to federal officers for prosecution. It is, to say the least, a process of brigandage which the Courts of Justice should not for an instant countenance.

We submit, therefore, that the judgment of the Honorable United States District Court for the District of Montana, should be reversed, and the case dismissed, and the property of plaintiffs in error returned as in their petition prayed for, for the reason that the constitutional rights of these plaintiffs in error have been most grossly violated and the pleadings in the case are not sufficient in form to sustain the verdict and judgment entered thereon.

J. A. KAVANEY,  
Attorney for Plaintiffs in Error, Murray L. McGrew and Frank L. Boyd.





IN THE  
**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit**

---

MURRAY L. MCGREW and FRANK L. BOYD,  
Plaintiffs in Error.

vs.

UNITED STATES OF AMERICA,  
Defendants in Error.

---

UPON WRIT OF ERROR TO THE UNITED  
STATES DISTRICT COURT FOR THE  
DISTRICT OF MONTANA

---

**Brief of Defendant in Error**

---

APPEARANCES:

JOHN L. SLATTERY,  
United States Attorney.

RONALD HIGGINS,  
Assistant U. S. Attorney.

WELLINGTON H. MEIGS,  
Assistant U. S. Attorney.

Attorneys for Defendant in Error.

---



No. 3840.

IN THE

**United States  
Circuit Court of Appeals**

**For the Ninth Circuit**

---

MURRAY L. MCGREW and FRANK L. BOYD,  
Plaintiffs in Error.

vs.

THE UNITED STATES OF AMERICA,  
Defendant in Error.

---

**Brief of Defendant in Error**





IN THE  
**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit**

---

MURRAY L. MCGREW and FRANK L. BOYD,  
Plaintiffs in Error.

vs.

THE UNITED STATES OF AMERICA,  
Defendant in Error.

---

**Brief of Defendant in Error**

---

FOREWORD.

---

For convenience, plaintiffs in error will be referred to here as defendants, and the defendant in error as the government

---

STATEMENT OF THE CASE.

---

As the statement of the case set forth in defendants' brief (pp. 2-5, inc.) is deemed incorrect in that it omits

certain important facts shown by the record, and also because it includes statements not founded on the record, the following statement of facts is submitted by the government.

On the night of November 10, 1921, the defendants were driving an automobile on the public highway in the County of Chouteau in the state and district of Montana, when they were intercepted by the sheriff of said county and one of his deputies, who halted the defendants with firearms and commanded them to leave the automobile. The car was loaded with whiskey which had been obtained in Canada (Tr. 18). The "liquid" was contained in 240 pint bottles or glass containers labeled "Pebbleford," and 24 glass containers of about four ounce size, labeled "Baird's Scotch." (Tr. 15.) The car, with its contents, was seized by said officers, and the defendants were arrested, and on the same day the county attorney of said county filed an information in the state district court for said county, charging the defendants with the crime of illegally possessing and transporting intoxicating liquors. (Tr. 13.) This information was subsequently dismissed on December 12, 1922, by the judge of said state district court, and it was ordered that the property taken by the sheriff from the defendants be returned and redelivered to them. On December 15, 1921, an information was filed in the United States District Court for the District of Montana, charging defendants with violation of the National Prohibition Act, the information being in three counts, two of which charged illegal transportation and the other un-

lawful possession, all as of date November 10, 1921. The charge contained in this information is the one on which the defendants were tried on December 20, 1921, and convicted, and from which judgment of conviction the writ of error herein has been sued out.

After the jury had been impaneled in this cause, the court excused them and heard the petition of the defendants for the return of the said automobile, and the said "liquid," which said petition was filed on December 17, 1921, the date of the arraignment of the defendants on the charge herein, which petition the court denied (Tr. 17), and then proceeded with the trial. The bottles found in the defendants' car "were usual whiskey bottles and labeled accordingly, and were admitted in evidence." (Tr. 19). The deputy sheriff who assisted in the search "tasted liquor from a bottle that the defendants had with them," and it was whiskey (Tr. 22.) The jury returned a verdict of guilty as charged.

At the trial the government produced only two witnesses, namely, U. W. Hammaker and George Campbell, sheriff and deputy sheriff, respectively, of Chouteau County, State and District of Montana, who testified that they, as state officers, without any co-operation with or instructions from any federal officers, on November 10, 1921, made the search, seizure and arrest of defendants and their property. (Tr. 20, 21.) All objections to and motions for dismissal pertain only to the testimony of these two witnesses, acquired while acting as state officers, with no authority from the

government and no collusion with any federal officers. (Tr. 18, 19, 22, 23.)

Defendants offered no testimony or evidence.

---

## ARGUMENT.

### I.

Contention by the defendants that the trial court erred "for the reason that the information as laid is in the name of Ronald Higgins, Assistant United States District Attorney, in his own name, he not being a prosecuting officer recognized by law," may be dispensed with at the outset; first, because if there were merit in such contention, the same was waived by defendants in failing to demur, or moving to strike, or interposing some kindred objection, and proceeding to trial; secondly, because defendants failed to incorporate the point in the assignment of errors; (Tr. 28, 29, 30, 31, 32, 33, 34) thirdly, because section 1420, C. S., in part says, concerning the appointment of Assistant United States Attorneys:

"Whenever in the opinion of the district judge of any district or the chief justice of any territory and the district attorney, evidenced by writing, the public interest requires it, one or more assistant district attorneys may be appointed by the Attorney General, but such opinion shall state to the Attorney General the facts as distinguished from the conclusion, showing the necessity therefor . . . . ,"

and further, section 538 C. S., provides:

"The Attorney General shall whenever in his opinion the public interest requires it, employ and



retain in the name of the United States, such attorneys and counselors at law as he may think necessary to assist the district attorneys in the discharge of their duties, . . . . ”

Which sections, if not in words, inferentially authorize Assistant United States Attorneys to do the same things that a United States Attorney is authorized to do. Any other interpretation puts the office of United States Attorney in a helpless condition when the chief is out of the district, or too ill to serve, or dead, and no successor appointed. It would be just as logical to assert that an Assistant United States Attorney cannot prosecute a case in a federal court, without the presence of the United States Attorney for the same district, as it is to contend that such an assistant cannot in his official name and capacity, file an information in a United States District Court, charging violators of federal criminal statutes with crime; fourthly, because this court has already disposed of the question in the case of

Brown vs. United States, 257 Fed. 703.

## II.

Counsel for defendants fails completely to distinguish the acts of the state officers, as such, in the search and seizure and arrest of defendants and their property, and the act of the federal officer in seizing the car and liquor on behalf of the government. It seems to have escaped his observation that all of the testimony given on behalf of the government was supplied entirely by state officers, and such testimony was

based upon acts done, and knowledge acquired by them before the information was filed against defendants, and while acting solely and exclusively as state officers.

Boiled down and simply stated, the assignments under the writ of error, involve the legality of using State officers as witnesses on the part of the government, and permitting them to testify at the trial, to facts learned by them while acting as State officers, and before the filing of the information, in searching the persons and automobile being driven by defendants, without first obtaining a search warrant or warrant of arrest.

Prominent among the cases cited by counsel for defendants to show error is *Weeks vs. U. S.*, 232, U. S. 383, but in selecting this case to uphold his position counsel seems to have left unseen the following language of the court found at page 398:

“As to papers and property seized by the policemen, it does not appear that they acted under any claim of Federal authority such as would make the Amendment (i. e. 4th) applicable to such unauthorized seizure. The record shows that what they did by way of arrest and search and seizure was done before the finding of the indictment in the Federal Court, under what supposed right or authority does not appear. What remedies the defendant may have against them we need not inquire, as the Fourth Amendment is not directed to individual misconduct of such officials. Its limitations reach the Federal Government. *Boyd case* 116, U. S., *supra* (616), and see *Twining v. New Jersey*, 211 U. S. 78.”

The same rule is laid down in the case of *Young-*

blood v. U. S. 266 Fed. 795, and after quoting the above excerpt from Weeks v. U. S., the court says:

“In the instant case the record shows that the search and seizure were made by the sheriff of that county, an officer of the state of North Dakota, before the indictment in the federal court had been returned, and there is nothing to show that the sheriff acted under the authority of a federal official”

See also:

U. S. v Folloco,  
U. S. v. Ross, 277 Fed. 75.  
Herine v. U. S., 276 Fed. 806.  
U. S. v. O'Dowd, 273 Fed. 600.  
U. S. v. Burnside, 273 Fed. 603.

Light is shed upon the question here in the decision of Burdeau, Sp. Asst. Atty. Gen., v. McDowell, 41 Sup. Ct. Rep. 574, wherein it is set forth on page 576:

“ (1) The Fourth Amendment gives protection against unlawful searches and seizures, and as shown in the previous cases, its protection applies to governmental action. Its origin and history clearly show that it was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies; as against such authority it was the purpose of the Fourth Amendment to secure the citizen in the right of unmolested occupation of his dwelling and the possession of his property, subject to the right of seizure by process duly issued.

In the present case the record clearly shows that no official of the federal government had anything to do with the wrongful seizure of the petitioner's property, or any knowledge thereof until several months after the property had been

taken from him and was in the possession of the Cities Service Company. It is manifest that there was no invasion of the security afforded by the Fourth Amendment against unreasonable search and seizure, as whatever wrong was done was the act of individuals in taking the property of another. A portion of the property so taken and held was turned over to the prosecuting officers of the federal government. We assume that petitioner has an unquestionable right of redress against those who illegally and wrongfully took his private property under the circumstances herein disclosed, but with such remedies we are not now concerned."

Further on this opinion holds:

"The papers having come into the possession of the government without a violation of petitioner's rights by governmental authority, we see no reason why the fact that individuals, unconnected with the government, may have wrongfully taken them, should prevent them from being held for use in prosecuting an offense where the documents are of an incriminatory character."

### III.

Assuming that the search and seizure had been done by federal instead of state officers, without a search warrant or warrant of arrest, even so, the evidence thus obtained would be admissible, because by virtue of the unlawful transportation, as the trial court held, the car and "liquid" became forfeited to the government, and recoverable by federal officers without process.

Boyd v. U. S., 116 U. S. 616.

U. S. vs. Fenton, 268 Fed. 221.



Even to a greater degree then, looking at the case from this angle, was the testimony of the state officers admissible.

#### IV.

Complaint is registered and error claimed by defendants, that the Court reopened the case and permitted the introduction of some of the liquor transported by the defendants. Such action rests in the sound discretion of the court.

1st Dec. Dig. page 882-5 and cases cited.

2nd Dec. Dig. page 970 et. sequi. and cases cited.

14 Century Dig. Crim. law. Sec. 1619, 1620, 21, 22, 23.

At best, the introduction of the liquor was merely cumulative, and only a slight addition to the testimony previously given, and could have had but small bearing, if any, upon the verdict, since no evidence was supplied by the defense and the case of the government was left uncontradicted.

As a matter fact some bottles of "liquid," identified as some of the bottles taken from defendants' car, and which were usual whiskey bottles and labeled accordingly, were admitted in evidence on the direct examination of the sheriff before the government rested its case. (Tr. 19).

---

#### CONCLUSION.

It was not error for the Assistant United States Attorney to file and verify the information herein in his own name; and it was not error for the court to reopen the case to permit the introduction in evidence of

other bottles of whiskey taken from defendants' car; nor was it error for the court to deny defendants' petition for the return of the "liquid," and the suppression of evidence and permit the state officers to testify respecting the search, seizure and arrest.

Respectfully submitted.

JOHN L. SLATTERY,  
United States Attorney.

RONALD HIGGINS,  
Assistant United States Attorney.

WELLINGTON H. MEIGS,  
Assistant United States Attorney.  
Attorneys for Defendant in Error.

United States  
4  
Circuit Court of Appeals  
For the Ninth Circuit.

---

HARRY W. ELLIOTT,

Plaintiff in Error,

vs.

AMERICAN SURETY COMPANY OF NEW  
YORK, a Corporation,

Defendant in Error.

---

Transcript of Record.

---

Upon Writ of Error to the Southern Division of the  
United States District Court of the  
Northern District of California,  
Second Division.

---

FILED

MAR 25 1922

F. D. MONCKTON,  
CLERK.





**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

---

HARRY W. ELLIOTT,

Plaintiff in Error,

vs.

AMERICAN SURETY COMPANY OF NEW  
YORK, a Corporation,  
Defendant in Error.

---

**Transcript of Record.**

---

Upon Writ of Error to the Southern Division of the  
United States District Court of the  
Northern District of California,  
Second Division.

---



# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

---

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	Page
Answer .....	12
Assignment of Errors.....	35
Bond on Writ of Error.....	38
Certificate of Clerk U. S. District Court to Judgment-roll .....	26
Certificate of Clerk U. S. District Court to Transcript of Record.....	41
Citation on Writ of Error.....	44
Complaint for Damages for False Imprison- ment .....	1
Demurrer .....	10
Judgment on Verdict.....	25
Marshal's Return on Summons.....	9
Minutes of Court—October 18, 1920—Order Overruling Demurrer.....	12
Minutes of Court—November 21, 1921—Order for Judgment, etc.....	27
Minutes of Court—December 19, 1921—Order Denying Petition for New Trial.....	34
Names and Addresses of Attorneys of Record..	1
Order Allowing Writ of Error.....	37
Order Denying Petition for New Trial.....	34
Order for Judgment, etc.....	27

Index.	Page
Order Overruling Demurrer.....	12
Petition for New Trial.....	28
Petition for Writ of Error.....	34
Praecipe for Transcript of Record on Writ of Error .....	39
Return to Writ of Error.....	44
Summons .....	7
Verdict .....	25
Writ of Error.....	42



**Names and Addresses of Attorneys of Record.**

CHALMER MUNDAY, Esq., and ALBERT PICKARD, Esq., Thomas Clunie Bldg., 519 California St., San Francisco, Calif.

Attorneys for Plaintiff.

J. G. DE FOREST, Esq., Foxcroft Bldg., San Francisco, Calif., and Messrs. CREED, JONES & DALL, Balfour Bldg., San Francisco, Calif.,  
Attorneys for Defendant.

---

In the District Court of the United States for the  
Southern Division of the Northern District of  
California.

(No. 16,439.)

HARRY W. ELLIOTT,

Plaintiff,

vs.

AMERICAN SURETY COMPANY OF NEW  
YORK, a Corporation,

Defendant.

**Complaint for Damages for False Imprisonment.**

Now comes the above-named plaintiff and complains of the above-named defendant, and for cause of action alleges:

I.

That at all the times herein mentioned plaintiff was and now is a citizen of the United States of

\

America and a citizen of the State of California, and is now a resident of the City of Los Angeles, County of Los Angeles, State of California.

## II.

That at all times herein mentioned Richard R. Veale was and now is the duly elected, qualified and acting sheriff of the County of Contra Costa, State of California.

## III

That at all times mentioned herein, said defendant American Surety Company of New York was and now is a corporation duly organized and existing under and by virtue of the laws of the State of New York and having its office and principal place of business in the City of New York, State of New York, and duly authorized to do business in the State of California.

## IV.

That the said matter in controversy, exclusive of interest and costs, exceeds the sum of Three Thousand (\$3,000.00) Dollars [1\*] in this: damages suffered by plaintiff herein in the sum of Thirty Thousand (\$30,000.00) Dollars by reason of the acts of Richard R. Veale as set forth herein.

## V.

That in qualifying as such sheriff said Richard R. Veale on or about the 16th day of November, 1918, caused to be recorded in the office of the

---

\*Page-number appearing at foot of page of original certified Transcript of Record.

County Recorder of said County of Contra Costa, State of California, in Volume Six of the official bonds, page 489 thereof, and then filed in the county clerk's office of said county, his official bond as such sheriff in the penal sum of Thirty Thousand (\$30,000.00) Dollars, approved by a Judge of the Superior Court of said county, for which payment well and truly to be made said Richard R. Veale and said defendant American Surety Company of New York, a corporation, jointly and severally, bound themselves, their heirs, executors and successors; that said Richard R. Veale signed and executed said bond as principal and said defendant American Surety Company of New York, a corporation, signed and executed said bond as surety therein; that said bond was conditioned; that if the said Richard R. Veale shall well, truly and faithfully perform all official duties required of him by law and all such additional duties as may hereafter be imposed on him as such officer by any law of the State of California, then the above obligation to be void, otherwise to remain in full force and virtue.

## VI.

That thereafter and on the 6th day of January, 1919, said Richard R. Veale duly entered upon the duties of his said office and ever since said 6th day of January, 1919, continued and at the present time continues to exercise the same.

## VII.

That thereafter, according to plaintiff's information and belief, a felony, to wit, murder, was committed on or about [2] the 9th day of September, 1919, in the town of Pittsburg, County of Contra Costa, State of California, which fact, according to plaintiff's information and belief, was immediately communicated and made known to said Richard R. Veale as such sheriff; and thereafter and on the 17th day of September, 1919, at Antioch, in the County of Contra Costa, State of California, the said Richard R. Veale as such sheriff informed said plaintiff that he, the said Richard R. Veale as such sheriff, had reasonable cause to believe that said plaintiff had committed the same, and immediately thereafter said Richard R. Veale as such sheriff by the use of force and in the presence of divers and sundry good people arrested said plaintiff and by said force then and there compelled said plaintiff in the presence of divers and sundry good people to go with him as such sheriff to the county jail in the City of Martinez, County of Costa, State of California, and did then and there as such sheriff cause said plaintiff to be incarcerated and detained therein on a purported charge of murder; that immediately upon said arrest said plaintiff protested his innocence and informed said Richard R. Veale as such sheriff that he was not the person wanted for said charge, that he was not in the town of Pittsburg, County of Contra Costa, State of Cali-



fornia, on said 9th day of September, 1919, at the time when said murder was committed, but was on said day, at the time said murder was committed, in the City of San Francisco, State of California, that he was not guilty of murder or any other felony committed on said 9th day of September, 1919, or on any other day in the town of Pittsburg, County of Contra Costa, State of California, or in any other town or place; that said Richard R. Veale as such sheriff then and there forcibly kept said plaintiff in his custody and so detained, restrained, imprisoned and deprived said plaintiff of his liberty for the space of twelve (12) days; that during said twelve (12) days and at all [3] other times, said Richard R. Veale as such sheriff failed, refused and neglected to release said defendant either with or without bail; that during the period of time from the 17th day of September, 1919, until the 24th day of September, 1919, said Richard R. Veale as such sheriff failed, refused and neglected to take plaintiff before a magistrate as required by law; that on said 24th day of September, 1919, said Richard R. Veale as such sheriff took plaintiff before a committing magistrate and caused an information to be filed against said plaintiff and that said plaintiff was thereupon held in the custody of said Richard R. Veale as such sheriff and detained, restrained, imprisoned, forcibly kept, and deprived of his liberty until the 29th day of September, 1919, on which said 29th day of September, 1919, said

plaintiff was discharged from custody by order of James Fitzgerald, Justice of the Peace, of the Sixth Township, County of Contra Costa, State of California, on the ground that there was not sufficient evidence to hold said plaintiff for said crime of murder; that said crime of murder was not committed, or claimed to have been committed, in the presence of said Richard R. Veale as such sheriff so arresting and imprisoning as aforesaid.

#### VIII.

That by reason of such imprisonment and restraint of his liberty as aforesaid, said plaintiff was injured in his good name and reputation and subjected to shame, disgrace, and humiliation before the citizens of said County of Contra Costa, State of California, and other counties in said state, and among his friends and acquaintances, and suffered greatly in mind and body by reason of the shame, disgrace and humiliation of said arrest and imprisonment as aforesaid.

#### IX.

That by reason of the premises the plaintiff has been damaged in the sum of Thirty Thousand (\$30,000.00) Dollars. [4]

WHEREFORE, plaintiff prays judgment against said defendant American Surety Company of New York, a corporation, for the sum of Thirty Thousand (\$30,000.00) Dollars; and for costs of suit.

JOSEPH SCOTT,  
Attorney for Plaintiff.

State of California,  
County of Los Angeles,—ss.

Harry W. Elliott, being duly sworn, deposes and says he is the plaintiff in the above-entitled action; that he has read the foregoing complaint for damages for false imprisonment and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information and belief, and as to those matters, that he believes it to be true.

HARRY W. ELLIOTT.

Subscribed and sworn to before me this 11th day of September, 1920.

[Seal] KATE McCANN,  
Notary Public in and for Los Angeles County, Cal.

[Endorsed]: Filed Sept. 13, 1920. Walter B. Maling, Clerk. [5]

---

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

HARRY W. ELLIOTT,

Plaintiff,

vs.

AMERICAN SURETY COMPANY OF NEW  
YORK, a Corporation,

Defendant.

**Summons.**

Action brought in said District Court, and the Complaint filed in the office of the Clerk of said District Court, in the City and County of San Francisco.

JOSEPH SCOTT,  
Plaintiff's Attorney.

The President of the United States of America,  
GREETING: To American Surety Company  
of New York, a Corporation, Defendant.

YOU ARE HEREBY DIRECTED TO APPEAR  
and answer the Complaint in an action entitled as  
above, brought against you in the Southern Division  
of the United States District Court for the Northern  
District of California, Second Division, within ten  
days after the service on you of this Summons—if  
served within this county; or within thirty days if  
served elsewhere.

And you are hereby notified that unless you appear and answer as above required, the said plaintiff will take judgment for any moneys or damages demanded in the Complaint, as arising upon contract, or he will apply to the Court for any other relief demanded in the Complaint.

WITNESS, the Honorable WILLIAM C. VAN FLEET, Judge of said District Court, this 13th day of September, in the year of our Lord one thousand nine hundred and twenty and of our In-



dependence the one hundred and forty-fourth.

[Seal]

WALTER B. MALING,

Clerk.

By C. M. Taylor,

Deputy Clerk. [6]

**(Marshal's Return on Summons.)**

United States Marshal's Office,

Northern District of California.

I hereby certify that I received the within writ on the 13th day of Sept., 1920, and personally served the same on the 13th day of Sept., 1920, on American Surety Co. of N. Y., a foreign corporation, by handing to and leaving with R. D. Weldon, who is the person designated by the defendant under the statutes of California as the person upon whom all legal process is to be served in matters affecting Amer. Surety Co., a corporation, in the State of California, a true and attested copy, together with copy of complaint attached thereto, in the City and County of San Francisco, in said district.

Dated: San Francisco, California, Sept. 13th, 1920.

J. B. HOLOHAN,

United States Marshal.

By Thos. F. Mulhall,

Deputy.

[Endorsed]: Filed Sept. 16, 1920. Walter B. Maling, Clerk. [7]

(Title of Court and Cause.)

**Demurrer.**

Now comes defendant above named and demurring to plaintiff's complaint on file herein as grounds of demurrer specifies:

**I.**

That said complaint does not state facts sufficient to constitute a cause of action against said defendant.

**II.**

That it appears from said complaint that this Court has no jurisdiction of defendant, and in this it affirmatively appears therefrom that the cause of action stated or attempted to be stated is one which will not lie against this defendant as surety, but, on the contrary, is one which will lie alone against said sheriff himself as principal, or persons or officers other than this defendant.

**III.**

That said complaint is uncertain in this, that it does not appear therein nor can it be ascertained therefrom whether said alleged arrest or imprisonment was made by said sheriff in obedience to a valid or any warrant delivered to him.

**IV.**

That said complaint is uncertain in this, that it does not appear therein nor can it be ascertained therefrom whether or not said alleged arrest or imprisonment was made pursuant to a warrant duly issued in accordance with law.

V.

That said complaint is uncertain in this, that it does not appear therein nor can it be ascertained therefrom whether or not said alleged arrest or imprisonment was made by said sheriff by reason of said sheriff having reasonable cause for [8] believing said felony referred to in said complaint had been committed by plaintiff.

VI.

That said complaint is uncertain in this, that it does not appear therein nor can it be ascertained therefrom whether or not said alleged arrest or imprisonment was made by said sheriff upon a charge made upon reasonable cause of the commission of a felony.

VII.

That said complaint is uncertain in this, that it does not appear therein nor can it be ascertained therefrom whether or not said alleged arrest or imprisonment was made by said sheriff acting in his official capacity in the line of his duty, or by said sheriff as an individual.

WHEREFORE, defendant prays that it may go hence dismissed with costs of suit.

Dated: October 2d, 1920.

CREED, JONES & DAHL and  
CHARLES A. SHURTLEFF and  
J. G. DE FOREST,  
Attorneys for Defendant.

[Endorsed]. Filed Oct. 2, 1920. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [9]

At a stated term, to wit, the July term, A. D. 1920, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Monday, the 18th day of October, in the year of our Lord one thousand nine hundred and twenty. Present: The Honorable ROBERT S. BEAN, District Judge for the District of Oregon, designated to hold and holding this Court.

No. 16,439.

HARRY W. ELLIOTT,

vs.

AMERICAN SURETY CO. OF N. Y.

**Minutes of Court—October 18, 1920—Order Overruling Demurrer.**

Defendant's demurrer to complaint came on to be heard and after arguments was submitted and it was ordered that said demurrer be, and the same is hereby, overruled. [10]

---

(Title of Court and Cause.)

**Answer.**

Now comes defendant American Surety Company of New York, a corporation, and answering plaintiff's complaint on file, herein admits, denies and alleges as follows:



I.

Denies that the matter in controversy, exclusive of interest and costs, or otherwise, exceeds the sum of Three Thousand Dollars (\$3,000.00), or any other sum, by reason of alleged damages suffered by plaintiff by reason of the alleged acts of Richard R. Veale, or otherwise.

II.

Denies that on the 17th day of September 1919, at Antioch, in the County of Contra Costa, State of California, or at any other time or place, or at all, the said Richard R. Veale as sheriff, informed plaintiff that he, said Richard R. Veale, as sheriff, had reasonable cause to believe that plaintiff had committed the crime of murder, or any other crime or offense.

Denies that said Richard R. Veale, as sheriff, ever, or at any time or place, or at all, by the use of force or in the presence of divers or sundry or any good or any people, or at all, arrested plaintiff.

Denies that said Richard R. Veale, as sheriff, by force or in any other manner, then or there, or at any time or place, or at all, compelled plaintiff, in the presence of divers or sundry or any good or any people, or in the presence of any people, or at all, to go with him, or with anyone else, or at all to the County Jail, or any jail, in the City of Martinez, County of Contra Costa, State of California, or elsewhere, or at all.

Denies that said Richard R. Veale, as sheriff, then or there, or at any time or place, caused plaintiff to be incarcerated or [11] detained in the

county or any jail in the City of Martinez, County of Contra Costa, State of California, or elsewhere, or at all, on a purported charge of murder, or any other crime, or at all.

Defendant has no information or belief upon the subject sufficient to enable it to answer the following allegations contained in paragraph VII of plaintiff's complaint, to wit:

“That immediately upon said arrest said plaintiff protested his innocence and informed said Richard R. Veale as such sheriff, that he was not the person wanted for said charge, that he was not in the town of Pittsburg, County of Contra Costa, State of California, on said 9th day of September, 1919, at the time when said murder was committed, but was on said day, at the time said murder was committed, in the City of San Francisco, State of California; that he was not guilty of murder or any other felony committed on said 9th day of September 1919, or on any other day, in the town of Pittsburg, County of Contra Costa, State of California, or in any other town or place.”

And, placing its denial upon that ground,—

Denies that immediately upon said alleged arrest, or at any time, said plaintiff protested his innocence, or informed said Richard R. Veale, as such sheriff, or otherwise, that he was not the person wanted for said charge, or that he was not in the town of Pittsburg, County of Contra Costa, State of California, on said 9th day of September 1919, at the time when said murder was committed, or

that he was, on said day, at the time said murder was committed, in the City of San Francisco, State of California, or that he was not guilty of murder, or any other felony committed on said 9th day of September 1919, or on any other day, in the Town of Pittsburg, County of Contra Costa, State of California, or in any other town or place.

Denies that said Richard R. Veale, as such sheriff, then or there forcibly, or at all, kept said plaintiff in his or any custody, or so or otherwise detained or restrained or imprisoned or [12] deprived plaintiff of his liberty, for the space of twelve days, or for any period whatever, and denies that said Richard R. Veale, as such sheriff, failed or refused or neglected to release defendant either with or without bail.

Denies that during the period from the 17th day of September 1919, until the 24th day of September 1919, or during any time whatever, said Richard R. Veale, as sheriff, failed or refused or neglected to take plaintiff before a magistrate as required by law or otherwise.

Denies that on the 24th day of September, 1919, said Richard R. Veale, as such sheriff, took said plaintiff before a committing magistrate and caused an information to be filed against said plaintiff, and that plaintiff was thereupon held in the custody of said Richard R. Veale as such sheriff, or detained or restrained or imprisoned or forcibly kept or deprived of his liberty until the 29th day of September, 1919, by said Richard R. Veale as such sheriff.

Admits that said crime of murder was not committed or claimed to have been committed in the presence of said Richard R. Veale as such sheriff, but denies that said Richard R. Veale as such sheriff, so or at all arrested or imprisoned said plaintiff.

### III.

Denies that by reason of said alleged or any imprisonment or alleged restraint of his liberty said plaintiff was injured in his good name and reputation, or good name or reputation, and subjected to shame, or subjected to shame and disgrace and humiliation, or shame or disgrace or humiliation, before the citizens of said County of Contra Costa, State of California, and or any other counties in said state, or before any citizens or persons whatsoever, and among his friends and acquaintances, or among his friends or acquaintances, or at all.

Denies that plaintiff suffered greatly or at all in mind and [13] body, or mind or body, by reason of the alleged shame and disgrace and humiliation, or shame or disgrace or humiliation of said alleged arrest and imprisonment, or arrest or imprisonment.

### IV.

Denies that plaintiff has been damaged in the sum of Thirty Thousand Dollars (\$30,000.00), or in any sum whatever, or at all, by reason of any act or omission of said Richard R. Veale, as sheriff, or of this defendant.

And for a further and separate and affirmative defense to the complaint of plaintiff, this defendant



upon its information and belief alleges:

That Joseph Minetti was found murdered on September 10th, 1919, on the highway leading from Pittsburg south to Nortonville, in said 6th Judicial Township of Contra Costa County, and from all appearances the murder had been committed on the previous night. That on the 10th day of September, 1919, W. J. McDermott, as such constable of said 6th Judicial Township, for good, sufficient and probable cause, swore to a complaint before James Fitzgerald, Justice of the Peace in and for the 6th Judicial Township, charging unknown persons under the fictitious names of John Doe, Richard Roe, John Black, Jane Doe and Sarah Roe with a felony, to wit: the crime of murder of said Joseph Minetti; that thereafter and on September 10th 1919, and upon the said Complaint, the said James Fitzgerald, as such Justice of the Peace, issued a warrant in due and legal form directed to any sheriff, marshal or policeman in the state, for the arrest of the said unknown persons under the fictitious names of John Doe, Richard Roe, John Black, Jane Doe and Sarah Roe.

That thereafter the said Richard R. Veale, as sheriff of the County of Contra Costa, and the said William N. Veale, who was during all times herein mentioned the duly appointed, qualified [14] and acting deputy sheriff of the County of Contra Costa, investigated the murder of said Joseph Minetti and were informed and from such information believed:

That prior to his said death the said Minetti had

kept a saloon at Pittsburg, California, which was the resort of persons of questionable character, especially dissolute women and other persons connected with the illicit drug trade, and particularly associated with one Al Ross, living at Antioch, California, who kept a saloon there and had been shortly before charged with, tried and acquitted of the murder of a man found dead at the foot of the stairs of said Ross' residence at Antioch, and who had more recently been in trouble with the county and state officers arising out of such trade in illicit drugs, and also with the said plaintiff, Harry W. Elliott, who, although reputed to be a man of means, had at various times up to the death of said Minetti been a barkeeper in said Ross' saloon and had been living in an ark on the waterfront at Antioch for some months prior thereto, and that the circumstances indicated that said Elliott was connected with said illicit sale of illicit drugs; that the said Minetti shortly prior to his death, had furnished bail in the sum of one thousand dollars for the said Ross when arrested for the sale of drugs; that the said Elliott, Minetti and Ross were associated in some way in such trade in illicit drugs; that about four o'clock P. M. on the day of the death of the said Minetti, the said Elliott and the said Ross were at said Minetti's saloon at Pittsburg; that the said Minetti then and thereafter up to the time of his death had with him a large sum of money; that subsequently and at about 8:50 o'clock P. M. on said day the said Elliott was seen in the back seat of an automobile then and there

driven by the said Minetti; that the said Minetti at or about 9:45 P. M. on that evening was shot in the back of the head twice while driving said automobile, from which wounds he died, and that, [15] when found on the next morning, he was still in said automobile seated at the wheel, and said machine was still in high gear with the lights burning and headed towards the town of Antioch; that on that evening two dissolute women who had been frequent companions of said Ross, Elliott and Minetti disappeared and their whereabouts could not be ascertained for about a week; that prior to that date the said Elliott had frequently made trips to San Francisco returning to Antioch within twenty-four hours, but that on the evening of the murder of the said Minetti said Elliott disappeared from Antioch and could not thereafter be found until September 17th, 1919; that during said time various parcels of mail came to him at Antioch in care of the said Ross, but that inquiry of the said Ross and from the known associates of said Elliott failed to give any information as to the whereabouts of said Elliott; that a search in the meantime had been made in San Francisco for the said Elliott and elsewhere according to all information which said authorities could get, but to no avail; that inquiries had been made of the said Ross as to the whereabouts of said Elliott, but that no definite information could be obtained from him; that the said authorities believed that Ross was in communication with the said Elliott concerning the murder of the said Minetti; that about 2 A. M. on

the morning of September 17, 1919, the said Elliott returned to Antioch by steamer and went immediately to the house of the said Ross and remained there until about 5 A. M. of the same day, when he left Ross' house and returned to his own ark; that the acts of said Elliott were such as to arouse the suspicion of the said sheriff and his deputies, and to cause him verily to believe that the said plaintiff was connected with the murder or had actually murdered the said Minetti; that from the date of the murder of the said Minetti up to said 17th day of September, 1919, said sheriff and his said deputies had been in constant communication [16] with the office of the district attorney of the County of Contra Costa, and had kept them informed of his search for the murderer of the said Minetti and for the said Elliott and of said facts concerning said Elliott, and, during all of said times and up to and including the arrest of said Elliott, had been acting upon the advice of the said district attorney; that the said William N. Veale, deputy sheriff, upon being informed of the return of the said Elliott, under conditions aforesaid, went to Antioch and at 6:30 A. M. of September 17th, 1919, aroused the said Elliott and inquired of him as to his previous whereabouts; that the said Elliott stated that he had been at Antioch and Pittsburg at various times, but at different hours from the information then held by the said sheriff and his deputies; that the said Elliott stated to said officers that he had been advised by the said Ross of the murder of the said Minetti, and that he, Elliott, should immediately



return to Antioch, although to said officers the said Ross had disclaimed any knowledge of the said Elliott's whereabouts; that the said sheriff and his said deputies verily believed that the said plaintiff had either murdered or had some connection with the murder of the said Minetti, and acting upon such information and belief and by and with the consent of the said district attorney of the County of Contra Costa, and believing that he had reasonable cause to believe that said plaintiff had committed such felony and under and by virtue of said warrant for the arrest of one John Doe for the murder of said Minetti, thereupon arrested the said Elliott for the murder of said Minetti; that he thereupon took the said Elliott to the scene of the said murder at Pittsburg and told him that the warrant for the arrest of the murderer had been issued in said 6th Judicial Township and that in all probability they could not reach the justice of the peace of said township for some hours, and that he was entitled to be taken before said justice of the peace on that day; that the said Elliott then informed the [17] said deputy sheriff that he did not want to go into court until he had seen his lawyer, and, with the consent of said Elliott, said deputy sheriff then took the said Elliott to the county jail at Martinez; that upon their arrival at Martinez, the said Elliott was shortly thereafter visited by A. F. Bray, an attorney at law, who had been notified by telephone by the said Ross of the said Elliott's arrest and requested by the said Ross to visit the said Elliott; that the said Elliott and

said A. F. Bray then and there conferred; that the said Elliott and his attorney, A. F. Bray, then representing him, and the district attorney of the County of Contra Costa thereupon conferred together as to the time when the said Elliott should be taken before the justice of the peace of the said 6th Judicial Township; that it was then agreed by the said Elliott, his said attorney and the said district attorney, that the said Elliott should not be taken before said justice of the peace of the 6th Judicial Township until such time as the said Elliott had an opportunity to come to San Francisco and show the officers where he had spent his time while absent from Antioch; that, by the request of the said Elliott, A. F. Bray, his attorney, and the consent of the district attorney, it was agreed that the said Elliott should be taken before the justice of the peace of the said 6th Judicial Township on September 24th, 1919, on which date he was so taken before said justice of the peace with his said attorney and informed of his rights as provided by law, and then and there by the consent and at the request of said Elliott his preliminary examination was continued to and set for September 29th, 1919, and said plaintiff was thereupon remanded to the custody of said sheriff without bail and was thereupon returned to said county jail at Martinez, and there held under such order of said justice of the peace until September 29th, 1919, on which date his preliminary examination was held before said justice of the peace, said Elliott, then and there being represented by attorneys of his own choosing

and at the conclusion of said preliminary examination [18] he was discharged from custody.

The said sheriff, deputy sheriff, constable and justice of the peace acting as aforesaid by and with the advice and consent of the said district attorney of the County of Contra Costa had reasonable and probable cause to believe, and did believe, that the plaintiff did commit or had been connected with the murder of the said Minetti, and that all said acts of the said R. R. Veale as such sheriff and said William M. Veale as such deputy sheriff were done and had while acting under such belief and by and with the consent of the said district attorney and with probable and reasonable cause and in the lawful and reasonable performance of their duties as such respective officials and under lawful authority and under process and orders regular on their face and issued by competent authority, and were without any malice on the part of any of them, and that the actions of the said Elliott were such as to reasonably and probably arouse the suspicions of the said sheriff and said deputy sheriff and of any reasonable man or men that the said Elliott was either the murderer of or implicated in the murder of the said Minetti, and that said acts are the same acts of which plaintiff complains.

WHEREFORE the said defendant prays that said plaintiff take nothing as against this defendant, but that said defendant may have judgment against

the said plaintiff for its costs incurred herein, and for general relief.

CREED, JONES & DALL,  
CHARLES A. SHURTLEFF,  
J. G. DE FOREST,  
Attorneys for Said Defendant. [19]

State of California,

City and County of San Francisco,—ss.

R. D. Weldon, being duly sworn, deposes and says: That he is an officer, to wit, the Resident Vice-President of the American Surety Company of New York, defendant in the above and foregoing entitled action; that he has read the foregoing Answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on information and belief, and as to those matters that he believes it to be true; that he makes this verification for and on behalf of said defendant, the American Surety Company of New York.

R. D. WELDON.

Subscribed and sworn to before me, this 19th day of November, 1920.

[Seal]

JOHN McCALLAN,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Nov. 19, 1920. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [20]



(Title of Court and Cause.)

**Verdict.**

We, the jury, find in favor of the defendant, *provide*, however, we award the plaintiff Seven Hundred and Fifty Dollars damages.

G. F. NEAL,  
Foreman.

[Endorsed]: Filed Nov. 21, 1921. W. B. Maling,  
Clerk. [21]

---

(Title of Court and Cause.)

**Judgment on Verdict.**

This cause having come on regularly for trial upon the 16th day of November, 1921, being a day in the November, 1921, term of said Court, before the Court and a jury of twelve men duly impaneled and sworn to try the issue joined herein; Joseph Scott, Benjamin L. McKinley and A. G. Ritter, Esqs., appearing as attorneys for plaintiff and M. R. Jones and J. G. DeForest, Esqrs., appearing as attorneys for defendant; and the trial having been proceeded with on the 17th, 18th and 21st days of November, in said year and term, and oral and documentary evidence upon behalf of the respective parties having been introduced and closed and the cause, after arguments by the attorneys and the instructions of the Court, having been submitted to the jury and the jury having subsequently rendered the following verdict which was ordered recorded,

namely: "We, the jury, find in favor of the defendant, *provide* however, we award the plaintiff Seven Hundred and Fifty Dollars damages. G. F. Neal, Foreman," and the Court having ordered that judgment be entered in favor of plaintiff in the sum of Seven Hundred Fifty (\$750.00) Dollars and for costs:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that Harry W. Elliott, plaintiff, do have and recover of and from American Surety Company of New York, a corporation, the sum of Seven Hundred Fifty and no/100 (\$750.00) Dollars, together with his costs herein expended taxed at \$573.78.

Judgment entered November 21, 1921.

WALTER B. MALING,  
Clerk.

A true copy.

[Seal] Attest: WALTER B. MALING,  
Clerk.

[Endorsed]: Filed Nov. 21, 1921. Walter B. Maling, Clerk. [22]

---

(Title of Court and Cause.)

**Certificate of Clerk U. S. District Court to Judgment-roll.**

I, Walter B. Maling, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing papers

hereto annexed constitute the judgment-roll in the above-entitled action.

Attest my hand and the seal of said District Court, this 21st day of November, 1921.

[Seal]

WALTER B. MALING,  
Clerk.

By J. A. Schaertzer,  
Deputy Clerk.

[Endorsed]: Filed November 21, 1921. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [23]

---

At a stated term, to wit, the November term, A. D. 1921, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom, in the City and County of San Francisco, on Monday, the 21st day of November, in the year of our Lord one thousand nine hundred and twenty-one. Present: The Honorable FRANK H. RUDKIN, District Judge for the Eastern District of Washington, designated to hold and holding this Court.

No. 16,439.

HARRY W. ELLIOTT

vs.

AMERICAN SURETY CO. of N. Y.

**Minutes of Court—November 21, 1921—Order for Judgment, etc.**

The parties and the jury being present as here-

tofore, the jurors were asked if they had agreed upon their verdict and they thereupon answered in the affirmative and returned a sealed verdict which was ordered opened and spread upon the minutes and which said verdict was in words and figures as follows, namely: "We, the jury, find in favor of the defendant, provided, however, we award the plaintiff Seven Hundred and Fifty Dollars damages. G. F. Neal, Foreman." Ordered that judgment be entered in favor of plaintiff in the sum of \$750.00 and for costs; to which verdict and order for judgment counsel for both sides duly excepted. Ordered that the jury be discharged. [24]

---

(Title of Court and Cause.)

### **Petition for New Trial.**

Now comes the plaintiff and petitions and moves the above-entitled Court to vacate and set aside the verdict and judgment in the above-entitled action and grant a new trial of said cause and for grounds for said motion presents and shows to the Court the following:

1. Irregularity in the proceedings of the Court by which the plaintiff was prevented from having a fair trial.
2. Irregularity in the proceedings of the jury by which the plaintiff was prevented from having a fair trial.
3. Irregularity in the proceedings of adverse



party by which the plaintiff was prevented from having a fair trial.

4. Orders of the Court by which plaintiff was prevented from having a fair trial.

5. Misconduct of the jury.

6. Accident which ordinary prudence could not have guarded against.

7. Surprise which ordinary prudence could not have guarded against.

8. Newly discovered evidence, material for the plaintiff, which he could not with reasonable diligence have discovered and produced at the trial.

9. Excessively low damages appearing to have been given under the influence of passion or prejudice.

10. Insufficiency of the evidence to justify the verdict.

11. That the verdict is against law.

12. Error in law occurring at the trial.

13. Insufficiency of the evidence to justify the verdict in the following particulars:

(a) That the evidence is insufficient to show that the arrest of the plaintiff was lawful; [25]

(b) That the evidence is insufficient to show that probable cause existed for the arrest of the plaintiff;

(c) That the evidence is insufficient to show that the arresting officer had knowledge of or was in the possession of any fact or facts which warranted the arrest of the plaintiff upon the charge of murder or which constituted probable cause for such arrest;

(d) That the evidence is insufficient to show any

fact or facts which justified or warranted the arrest of said plaintiff without a warrant, or to show probable cause for such arrest without a warrant;

(e) That the evidence is insufficient to show any reason or excuse for the failure of the arresting officer to obtain a legal warrant for the arrest of said plaintiff, if probable cause existed for said arrest, prior to making said arrest;

(f) That the evidence is insufficient to show any justification for a verdict in so small an amount as seven hundred fifty (750) dollars; but, on the contrary, said evidence shows that the said plaintiff was entitled to a verdict for a sum greatly in excess thereof;

(g) That the evidence is insufficient to justify that purported portion of the verdict which seeks or attempts to find a verdict in favor of the defendant;

(h) That the evidence is insufficient to show that the plaintiff has not been damaged in an amount far in excess of seven hundred fifty (750) dollars;

(i) That the evidence is insufficient to show any waiver by the plaintiff of his right to be taken without unnecessary delay after his arrest before the nearest or most accessible magistrate in the County of Contra Costa and an information stating the charge against said plaintiff laid before such magistrate; [26]

(j) That the evidence is insufficient to show any reason or excuse for the failure of the arresting officer after arresting said plaintiff to take him without unnecessary delay before the nearest or

most accessible magistrate in the County of Contra Costa, and lay before such magistrate an information stating the charge against said plaintiff;

14. Error in law occurring at the trial in the following particulars:

(a) That the Court erroneously instructed the jury that the question of probable cause in this case, under the evidence, was one of fact for the jury to consider;

(b) That the Court erroneously refused to instruct the jury that as a matter of law there was not probable cause for the arrest of the plaintiff by the arresting officer;

(c) That the Court erroneously instructed the jury that if certain statements of facts in his charge set out were true, then there was reasonable cause for the arrest of said plaintiff upon the charge of having committed murder;

(d) That the Court erroneously instructed the jury that the right of the plaintiff to be taken before a magistrate without unnecessary delay was a personal right which may be waived and that if a waiver thereof was shown, it was a complete defense to the arresting officer for delay in taking the plaintiff before a magistrate;

(e) That the Court erroneously instructed the jury that if they found the arrest or detention, or both, of plaintiff were unlawful, then they could only allow actual damages and could not award punitive or exemplary damages;

(f) That the Court erroneously instructed the jury that the plaintiff must prove by a preponder-

ance of the evidence what his reputation was in the particulars for which he claims injury at the time of his arrest in the county in which he then [27] lived; and must also submit evidence satisfactory to the jury from which it can be inferred that his reputation at that time suffered injury;

(g) That the Court erroneously refused to give said instructions as were requested by the plaintiff and refused by the Court;

(h) Erroneous rulings by the Court sustaining objections made by the defendant to questions propounded by plaintiff's counsel to plaintiff as a witness and to which rulings exceptions were duly noted;

(i) Erroneous rulings by the Court overruling objections made by plaintiff's counsel to questions asked by defendant's counsel of plaintiff in cross-examination to which exceptions were duly noted;

(j) Erroneous rulings by the Court overruling objections made by plaintiff's counsel to questions asked by defendant's counsel of the witnesses R. R. Veale and William M. Veale and to which exceptions were duly noted;

(k) Erroneous rulings of the Court overruling objections by plaintiff's counsel to questions asked by defendant's counsel of the witness Jessie Renna and to which rulings exceptions were duly noted.

The papers upon which said application is to be made and said petition is to be heard are all the pleadings and papers on file and all the files and records in the above-entitled cause and the minutes



of the Court and affidavits that may be served and filed herein.

Dated: December 1, 1921.

CHALMER MUNDAY,

ALBERT PICARD,

Attorneys for Plaintiff. [28]

Receipt of copy of the within petition for new trial and copy of substitution of attorneys is hereby admitted this 1st day of December, 1921.

J. G. DE FOREST,

CREED, JONES & DALL,

Attorneys for Defendant.

[Endorsed]: Filed Dec. 1, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [29]

---

At a stated term, to wit, the November term, A. D. 1921, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Monday, the 19th day of December, in the year of our Lord one thousand nine hundred and twenty-one. Present: The Honorable FRANK H. RUDKIN, District Judge for the Eastern District of Washington, designated to hold and holding this Court.

No. 16,439.

HARRY W. ELLIOTT

vs.

AMERICAN SURETY CO.

**Minutes of Court—December 19, 1921—Order Denying Petition for New Trial.**

Plaintiff's petition for a new trial came on to be heard and after arguments being submitted, it was ordered that said petition for a new trial be and the same is hereby denied. [30]

---

(Title of Court and Cause.)

**Petition for Writ of Error.**

To the Above-entitled Court:

Now comes Harry W. Elliott, the plaintiff in the above-entitled cause, and feeling himself aggrieved by the verdict of the jury and the judgment of the above-entitled court entered therein on the 21st day of November, 1921, hereby petitions this Honorable Court for an order allowing him to prosecute a writ of error from the United States Circuit Court of Appeals of the Ninth Circuit to said United States District Court for the Northern District of California, Southern Division, on the ground that in said verdict and judgment and proceedings and prior thereto certain errors were committed to the prejudice of this plaintiff as will more fully appear from the assignment of errors filed with this petition.

WHEREFORE, this plaintiff prays that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Ninth Circuit for the correction of the errors as complained of and that a transcript of the record, proceedings

and papers in this cause, duly authenticated, may be sent to said Circuit Court of Appeals.

ALBERT PICARD,  
CHALMER MUNDAY,  
Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 21, 1922. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [31]

---

(Title of Court and Cause.)

**Assignment of Errors.**

Now comes Harry W. Elliott, the plaintiff in error in the above-entitled cause, and in connection with his petition for a writ of error makes the following assignment of errors:

First: The Court erred in entering judgment in favor of plaintiff in the sum of seven hundred fifty (\$750.00) dollars on the verdict rendered herein, because;

- (a) The said verdict is inconsistent on its face;
- (b) The said verdict is not responsive to the issues formed by the pleadings;
- (c) The jury by which said cause was tried found for the defendant and at the same time found for the plaintiff on the same issues and the same evidence. It was thereby determined that plaintiff suffered no damages and at the same time plaintiff was awarded damages in the sum of seven hundred fifty (\$750.00) dollars for the same acts for which the said jury found for the defendant; which said sum of seven hundred fifty (\$750.00) dollars is nom-

inal in amount for the imprisonment of this plaintiff in error for a period of at least twelve days upon the charge of murder, as alleged in the complaint herein and admitted in the answer herein;

(d) The said verdict does not support a judgment.

Second: The Court erred in refusing to grant plaintiff in error a new trial, because,

(a) The jury by which said cause was tried by its verdict found for the defendant. It was thereby determined that R. R. Veale, the Sheriff of Contra Costa County, the officer for whom defendant in error was and is the surety, did not commit a trespass in the matter of falsely imprisoning plaintiff in error and at the same time plaintiff in error was awarded damages in the sum of seven [32] hundred fifty (\$750.00) dollars for the same false imprisonment which said sum is nominal in amount for the imprisonment of this plaintiff in error for a period of at least twelve days on a charge of murder as alleged in the complaint herein and admitted in the answer herein.

(b) Said verdict was and is inconsistent on its face and plaintiff in error is of right entitled to a new trial.

(c) Said verdict is not responsive to or determinative of the issues formed by the pleadings and plaintiff in error is entitled to have said issues clearly determined.

WHEREFORE, said plaintiff in error prays that the judgment of said District Court of the United



States be reversed, and that said Court be directed to grant a new trial of the said cause.

Dated: February 21, 1922.

CHALMER MUNDAY,  
ALBERT PICARD,  
Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 21, 1922. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [33]

---

(Title of Court and Cause.)

**Order Allowing Writ of Error.**

This 21st day of February, 1922, came plaintiff Harry W. Elliott, by his attorneys, and filed herein and presented to the Court his petition, praying for an allowance of a writ of error, an assignment of errors intended to be urged by him, praying, also, that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the Court does allow the writ of error upon the plaintiff giving bond according to law in the sum of Three Hundred (\$300.00) Dollars, as security for costs on said writ of error.

WM. C. VAN FLEET,  
Judge of the District Court.

[Endorsed]: Filed Feb. 21, 1922. W. B. Maling,  
Clerk. By. J. A. Schaertzer, Deputy Clerk. [34]

---

(Title of Court and Cause.)

**Bond on Writ of Error.**

KNOW ALL MEN BY THESE PRESENTS:  
That we, Harry W. Elliott, as principal, and  
National Surety Company, a corporation organized  
and existing under and by virtue of the laws of the  
State of New York, and duly licensed to transact  
its business of suretyship in the State of California,  
as surety, are held and firmly bound unto American  
Surety Company of New York, the defendant in  
error, in the sum of Three Hundred Dollars, law-  
ful money of the United States, to be paid to said  
defendant, its attorneys, executors, administrators  
or assigns, to which payment well and truly to be  
made, we bind ourselves and each of us jointly and  
severally, and each of our heirs, executors and ad-  
ministrators by these presents.

Sealed with our seals and dated this 21st day of  
February, 1922.

WHEREAS, lately at the Southern Division of  
the United States District Court for the Northern  
District of California, Second Division, in a suit  
pending in said Court between Harry W. Elliott,  
plaintiff, and American Surety Company of New  
York, defendant, judgment was rendered in favor  
of plaintiff in the sum of Seven Hundred and  
Fifty Dollars; and

WHEREAS, the above-named plaintiff is dissatisfied with said judgment and has prosecuted a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment of the said United States District Court for the Northern District of California, Second Division, in the above-entitled cause;

NOW, THEREFORE, the condition of this obligation is such that if the said Harry W. Elliott shall prosecute said writ of error to effect and answer all damages and costs if he fail to make the said plea good, then the above obligation to be void, else to remain [35] in full force and effect.

HARRY W. ELLIOTT.

NATIONAL SURETY COMPANY.

By F. J. CRISP,  
Resident Vice-president.

[Seal]

By A. C. ROBESON,  
Resident Assistant Secretary.

Approved as to form and sufficiency this 25th day of February, 1922.

WM. C. VAN FLEET,  
District Judge.

[Endorsed]: Filed Feb. 25, 1922. Walter B. Maling, Clerk. [36]

---

(Title of Court and Cause.)

**Praeceptum for Transcript of Record on Writ of Error.**  
To the Clerk of the Above-entitled Court:

You are hereby requested to prepare a transcript

of record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit pursuant to a writ of error herein and to include in such transcript of record the following papers:

1. The complaint.
2. The answer.
3. The verdict of the jury.
4. Judgment.
5. Motion or petition for a new trial.
6. Order denying motion for a new trial.
7. Petition for writ of error.
8. Assignment of errors.
9. Order directing writ of error.
10. Cost bond.
11. Praecipe for transcript.
12. Clerk's transcript.
13. All orders of Court, minute orders and matters and things contained in the judgment-roll.

ALBERT PICARD,

CHALMER MUNDAY,

Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 28, 1922, W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [37]



In the Southern Division of the United States  
District Court, in and for the Northern District  
of California, Second Division.

No. 16,439.

HARRY W. ELLIOTT,

Plaintiff,

vs.

AMERICAN SURETY COMPANY OF NEW  
YORK, a Corporation,

Defendant.

**Certificate of Clerk U. S. District Court to Tran-  
script of Record.**

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify the foregoing thirty-seven (37) pages, numbered from 1 to 37, inclusive, to be a full, true and correct copy of the record and proceedings as enumerated in the praecipe for record on writ of error in the above-entitled cause, as the same remains of record and on file in the office of the clerk of said court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is \$16.85; that said amount was paid by the plaintiff, and that the original writ of error and citation issued in said cause are hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court,

this 13th day of March, A. D. 1922.

[Seal]                      WALTER B. MÅLING,  
Clerk United States District Court for the Northern  
District of California.

By J. A. Schaertzer,  
Deputy Clerk. [38]

---

### **Writ of Error.**

UNITED STATES OF AMERICA,—ss.

The President of the United States of America,  
to the Honorable, the Judges of the District  
Court of the United States for the Northern  
District of California, GREETING:

BECAUSE, in the record and proceedings, as also  
in the rendition of the judgment of a plea which is  
in the said District Court, before you, or some of  
you, between Harry W. Elliott, plaintiff in error,  
and American Surety Company of New York, de-  
fendant in error, a manifest error hath happened,  
to the great damage of the said Harry W. Elliott,  
plaintiff in error, as by his complaint appears:

We, being willing that error, if any hath been,  
should be duly corrected, and full and speedy jus-  
tice done to the parties aforesaid in this behalf, do  
command you, if judgment be therein given, that  
then under your seal, distinctly and openly, you  
send the record and proceedings aforesaid, with  
all things concerning the same, to the United States  
Circuit Court of Appeals for the Ninth Circuit,  
together with this writ, so that you have the same

at the City of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable WILLIAM H. TAFT, Chief Justice of the United States, the 25th day of February, in the year of our Lord one thousand nine hundred and twenty-two.

[Seal]                      WALTER B. MALING,  
Clerk of the United States District Court, Northern  
District of California.

By J. A. Schaertzer,  
Deputy Clerk.

Allowed by

WM. C. VAN FLEET,  
United States District Judge. [39]

[Endorsed]: No. 16,439. United States District Court for the Northern District of California, Second Division. Harry W. Elliott, Plaintiff in Error, vs. American Surety Company of New York, Defendant in Error. Writ of Error. Filed Feb. 28, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

Receipt of copy of within writ admitted this  
28th day of February, 1922,

CREED, JONES & DALL,  
J. G. DE FOREST,  
Attorneys for Defendant in Error.

**(Return to Writ of Error.)**

The answer of the Judge of the District Court of the United States, in and for the Northern District of California, Second Division.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal]

WALTER B. MALING,  
Clerk U. S. District Court for the Northern District  
of California.

By J. A. Schaertzer,  
Deputy Clerk. [40]

---

**Citation on Writ of Error.**

UNITED STATES OF AMERICA,—ss.

The President of the United States, to American  
Surety Company of New York, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the



Clerk's Office of the United States District Court for the Northern District of California, Southern Division, wherein Harry W. Elliott is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment herein rendered, as in the said writ of error mentioned, should not be corrected, any why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable ———, United States District Judge for the Northern District of California, Southern Division, this 25th day of February, A. D. 1922.

WM. C. VAN FLEET,  
United States District Judge. [41]

[Endorsed]: No. 16,439. United States District Court for the Northern District of California, Second Division. Harry W. Elliott, Plaintiff in Error, vs. American Surety Company of New York, Defendant in Error. Citation on Writ of Error. Filed Feb. 28, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

Receipt of copy of within citation admitted this 28th day of February, 1922.

CREED, JONES & DALL,  
J. G. DE FOREST,  
Attorneys for Deft. in Error.

---

[Endorsed]: No. 3842. United States Circuit Court of Appeals for the Ninth Circuit. Harry W. Elliott, Plaintiff in Error, vs. American Surety

Company of New York, a Corporation, Defendant  
in Error. Transcript of Record. Upon Writ of  
Error to the Southern Division of the United States  
District Court of the Northern District of Cali-  
fornia, Second Division.

Filed March 14, 1922.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.

No. 3842

IN THE

**United States Circuit Court of Appeals**

**For the Ninth Circuit**

HARRY W. ELLIOTT,

*Plaintiff in Error.*

VS.

AMERICAN SURETY COMPANY OF  
NEW YORK (a corporation),

*Defendant in Error.*

**BRIEF FOR PLAINTIFF IN ERROR.**

CHALMER MUNDAY,

ALBERT PICARD,

*Attorneys for Plaintiff in Error.*

FILED

APR 27 1902

F. D. MONKTON,





No. 3842

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

---

HARRY W. ELLIOTT,

*Plaintiff in Error,*

VS.

AMERICAN SURETY COMPANY OF  
NEW YORK (a corporation),

*Defendant in Error.*

## BRIEF FOR PLAINTIFF IN ERROR.

---

This is action by plaintiff in error for damages for false imprisonment against defendant in error as the surety on the official bond of Richard R. Veale, who was at all times mentioned in the complaint the duly elected, qualified and acting Sheriff of Contra Costa County, California. The complaint alleges that plaintiff in error was arrested by said Veale as such sheriff on the 17th day of September, 1919, on the charge of murder and imprisoned in the county jail of Contra Costa County for a period of twelve days, namely, from the said 17th day of September, 1919, to the 29th day of September, 1919, and further alleges (page 6 Transcript):

## "VIII.

"That by reason of such imprisonment and restraint of his liberty as aforesaid, said plaintiff was injured in his good name and reputation and subjected to shame, disgrace and humiliation before the citizens of said County of Contra Costa, State of California, and other counties in said state, and among his friends and acquaintances, and suffered greatly in mind and body by reason of the shame, disgrace and humiliation of said arrest and imprisonment as aforesaid.

## "IX.

"That by reason of the premises plaintiff has been damaged in the sum of thirty thousand (30,000.00) dollars."

and prays for judgment against the defendant in the said sum of \$30,000.

The answer denies the allegations of the complaint and in addition sets up an affirmative defense of probable cause for the arrest and detention of plaintiff and admits that the plaintiff was arrested, held and detained for the period and at the times alleged in the complaint but claims that the said sheriff had reasonable cause therefor.

The cause was tried before a jury in the Southern Division of the United States District Court of the Northern District of California, Second Division, on the 16th day of November, 1921, and the jury returned the following verdict:

"We, the jury, find in favor of the defendant, " provide, however, we award the plaintiff seven " hundred and fifty dollars damages.

"G. F. Neal, Foreman."

Upon this verdict judgment was by the court ordered entered in favor of plaintiff in the sum of \$750.00 and for costs; to which verdict and order counsel for both sides duly excepted (Transcript p. 28).

Plaintiff on December 1, 1921, duly filed his petition and motion for a new trial, which said petition and motion were heard by the said court and denied on the 19th day of December, 1921.

Plaintiff thereupon sued out this writ of error from said District Court and presents to this Honorable Court the following as his

#### **ASSIGNMENT OF ERRORS:**

First: The court erred in entering judgment in favor of plaintiff in the sum of seven hundred fifty (\$750.00) dollars on the verdict rendered herein, because,

(a) The said verdict is inconsistent on its face;

(b) The said verdict is not responsive to the issues formed by the pleadings;

(c) The jury by which said cause was tried found for the defendant and at the same time found for the plaintiff on the same issues and the same evidence. It was thereby determined that plaintiff suffered no damages and at the same time plaintiff

was awarded damages in the sum of seven hundred fifty (\$750.00) dollars for the same acts for which the said jury found for the defendant; which said sum of seven hundred fifty (\$750.00) dollars is nominal in amount for the imprisonment of this plaintiff in error for a period of at least twelve days upon the charge of murder, as alleged in the complaint herein and admitted in the answer herein;

(d) The said verdict does not support a judgment.

Second: The court erred in refusing to grant plaintiff in error a new trial, because,

(a) The jury by which said cause was tried by its verdict found for the defendant. It was thereby determined that R. R. Veale, the Sheriff of Contra Costa County, the officer for whom defendant in error was and is the surety, did not commit a trespass in the matter of falsely imprisoning plaintiff in error and at the same time plaintiff in error was awarded damages in the sum of seven hundred fifty (\$750.00) dollars for the same false imprisonment, which said sum is nominal in amount for the imprisonment of this plaintiff in error for a period of at least twelve days on a charge of murder as alleged in the complaint herein and admitted in the answer herein;

(b) Said verdict was and is inconsistent on its face and plaintiff in error is of right entitled to a new trial.



(c) Said verdict is not responsive to or determinative of the issues formed by the pleadings and plaintiff in error is entitled to have said issues clearly determined.

---

#### ONE ISSUE.

One issue only is presented by the pleadings, namely, the tort for false imprisonment, and the jury by its verdict found both ways on the same issue. The verdict is a general one and should "find on all the facts in issue in a general form". The verdict here is contradictory, inconsistent and uncertain and can not be cured by the judgment.

Bashford v. Kendall, 7 Pac. 176.

---

#### AN ELEMENTARY QUESTION OF LAW.

The question here presented is elementary and the mere recital of the verdict, together with the assignment of errors hereinabove set out is sufficient to demonstrate that the judgment herein entered should be reversed and a new trial granted to plaintiff in error. The verdict does not decide the issue submitted, is inconsistent on its face, and can not support a judgment.

The word "verdict" has been defined in numberless adjudicated cases. We will quote but one:

"A verdict may be defined to be the answer of the jury to the questions of fact formed by the pleadings of the parties."

Day v. Webb, 28 Conn. 140, at p. 143.

It is elementary that it should respond to the issues and impart a definite meaning free from ambiguity.

“A verdict should be certain and impart a definite meaning free from ambiguity. The jury can not find *both, for plaintiff and defendant on the same issue, as for instance, by a verdict giving the plaintiff damages and finding the defendant not guilty.*”

27 Ruling Case Law, page 858, par. 30, citing Grotton v. Glidden, 84 Me. 589. (Italics ours.)

In further support of these elementary principles we cite from East St. Louis Cotton Oil Co. v. Skinner Bros. Mfg. Co., 249 Fed. 439; 162 C. C. A. 5, decided March 8, 1918, error to the District Court for the Eastern Division of Missouri.

This was an action for labor performed and materials furnished on an open account for reasonable value and the defendant counterclaimed asserting plaintiff's breach of an alleged contract to install a ventilating system at an agreed price while plaintiff asserted that no price had been fixed. On the trial of the case the jury returned the following verdict:

“We, the jury in the above entitled cause, find the issues herein joined under the petition of plaintiff, in favor of said plaintiff, and we find that defendant is indebted to plaintiff by reason of the account stated in said petition in the sum of forty-five hundred and ninety-four and 79/100 (\$4,594.79) dollars.

“We further find the issues herein joined under the counterclaim of defendant in favor

of said defendant, and we assess the damages of defendant under said counterclaim at the sum of one thousand 00/100 dollars.”

*Carland*, Circuit Judge, in delivering the opinion uses the following language:

“The jury therefore in returning a verdict for plaintiff as stated, found that the work performed and materials furnished in the construction of the dust collector was performed and furnished on an open account basis for a reasonable compensation, and thereby also found that there was no special contract as claimed by the defendant. On the other hand in finding for the defendant upon the issues joined under the counterclaim and assessing its damages at the sum of \$1000—the jury necessarily found that there was a special contract as claimed by the defendant, and that the defendant had breached the same, to the defendant’s damage, in the sum of \$1000.

“It requires no argument to make it plainly appear that the verdict of the jury is so inconsistent that no judgment could be entered upon it. *Allen v. Sallinger*, 105 N. C. 333; 10 S. E. 1020; *Gwin v. Gwin*, 5 Ida. 271; 48 Pac. 295; *Mitchell v. Brown*, 88 N. C. 156; *Mitchell v. Printup*, 27 Ga. 469; *Ruth v. McPherson*, 150 Mo. App. 694; 131 S. W. 474; *Bauer Engineering etc., v. Arctic Ice & Storage Co.*, 186 Mo. App. 662; 172 S. W 417.

“2. As before stated, the important question litigated by the evidence was whether there was a special contract, and the jury found both ways on the question. It is assigned as error that the verdict is inconsistent with itself and that the trial court erred in entering judgment thereon. The question as to whether the verdict supports the judgment is a question of law which appears on the face of the record without

a bill of exceptions. Such questions may be assigned as grounds of reversal, although no exception is taken. *Dener v. Holmes Savings Bank*, 236 U. S. 101 53; Sup. Ct. 265; 59 L. Ed. 435; *Nalle v. Oyster*, 230 U. S. 165; 33 Sup. Ct. 1043; 57 L. Ed. 1439; *Snowden v. Ft. Lyon Canal Co.*, 238 Fed. 495; 151 C. C. A. 431."

The cases cited by the Circuit Judge in the foregoing case are to the same effect. *Ruth v. McPherson*, 150 Mo. App. 694; 131 S. W. 474, was an action by a physician for services, and the defendant in his answer alleged the services were negligently performed and were worthless and by way of counterclaim, alleged malpractice on the part of the physician and damages therefor. A verdict for plaintiff for the services and for defendant on the counterclaim was held to be inconsistent with itself and could not stand, inasmuch as the counterclaim was founded upon the same matters pleaded as a defense to the account for services.

*Fred Bauer Engineering & Contracting Co. v. Arctic Ice & Storage Co.*, 186 Mo. App. 662; 172 S. W. 417, was decided by the same court, and was a suit brought on a contract for a stipulated price for performing certain work in accordance with its provisions, and the defendant denied that plaintiff was entitled to recover anything and filed a counterclaim for failure to do the work according to the requirements of the contract and within the time therein provided. A verdict was rendered in favor of plaintiff on its claim, and in favor of de-



fendant on its counterclaim, for an amount greater than the contract price for doing the work. The verdict was held to be so inconsistent that it could not be permitted to stand, since a verdict for plaintiff must necessarily be founded upon at least substantial compliance with the contract by it, while, on the other hand, defendant's right of recovery on the counterclaim depended upon a finding that plaintiff failed to substantially perform its contract. Reynolds, Presiding Judge, in delivering the opinion of the court, uses the following language, (186 Mo. App. 664, 670 et seq.):

"In this case as in *Johnson v. Labarge* (cited in the opinion) either party might have appealed upon the ground that it was prejudiced by the verdict; for the plaintiff might well take the position, as it does here, that since the jury found that it had substantially performed the contract, it was entitled to recover, and to have no damages awarded against it on the counterclaim; while on the other hand defendant might, with equal propriety, take the position that since the jury had found that since the plaintiff had breached the contract, defendant was entitled to its damages without the same being cut down by the amount awarded the plaintiff.

"Where, as here, the verdict of the jury is not responsive to the pleadings, is in the very teeth of instructions, and altogether fails to resolve the issue of fact presented to the jury, it appears that either party may justly assert that he is prejudiced thereby in that he had not had a trial and a finding upon the issues in the case.

\* \* \* \* \*

"Every litigant is entitled to have the real issues of fact in his case actually resolved by

those who sit in judgment thereupon, and is not compelled to abide by a verdict which attempts to resolve those issues both in his favor and in that of his adversary.”

In the instant case the plaintiff has alleged that he was imprisoned and held in confinement in the county jail of Contra Costa County, California, for a period of twelve days, on a charge of murder. He has brought his action to have it determined by a jury of his peers that he was wrongfully held and has asked for damages. The damages which he has suffered arise from being falsely charged with such a crime and unlawfully imprisoned for twelve days. He should not be compelled to abide by a verdict which allows him the nominal sum of \$750 as damages for such a continued wrong and at the same time finds the person responsible for the wrong guiltless.

That such a verdict is inconsistent on its face and can not be permitted to stand, we submit, is self-evident. If any further citation be necessary, we call attention to the recent case of *Joseph Rosenthal v. United States of America*, decided by this Honorable Court on December 5, 1921, and subsequent to the trial of the case at bar. This was a criminal case in which the plaintiff in error was indicted under two counts, the first of having willfully and feloniously bought and received certain stolen cigarettes, and the second charging him at the same time and place of having the same cigarettes in his possession. The jury brought in a ver-

dict of not guilty on the first count, but found the plaintiff in error guilty on the second count.

Ross, C. J., in the concluding paragraph of the opinion of the court, uses the following language:

“The difficulty is that there was but *one* transaction involved in the two counts of the indictment which was based under the statute mentioned, and according to the evidence, but one transaction between the plaintiff in error and the thieves. By its verdict upon the first count of the indictment the jury found that plaintiff in error neither bought nor received the cigarettes from them with knowledge of the theft, and by its verdict upon the second count, that the plaintiff in error was at the same time and place in possession of the property with such guilty knowledge. The two findings are thus wholly *inconsistent* and *conflicting*. For this reason we feel obliged to reverse the judgment and remand the case for a new trial.” (Italics ours.)

In the instant case, we submit that the verdict is wholly inconsistent and uncertain. In such cases it is uniformly held that the trial court *must* grant a new trial and that there is no discretion on the part of the trial judge. *Pugh v. Bluff City Excursion Co.*, 177 Fed. 399, was error to the Circuit Court of Appeals for the Sixth Circuit. Plaintiff was a widow who sued for damages for the death of her son. The jury found for the plaintiff and fixed her damages at one dollar. The court held that the evidence showed that if plaintiff was entitled to recover at all it was in a substantial amount and that the conclusion was unavoidable

that the verdict was simply a compromise to prevent a disagreement, and held that in a case where the verdict is *inconsistent* on its face it becomes a positive duty on the part of the trial judge to set aside the erroneous proceeding and grant a new trial.

In *Glenwood Irrigation Co. v. Vallery*, 248 Fed. 485 (8th Circuit), decided January 26, 1918, under a similar state of facts, where the jury found for a much less amount of damages than the undisputed evidence showed, the court held that it was the *duty* of the trial court as *a matter of law* to decline to enter judgment upon so inconsistent a verdict and that it was an abuse of discretion to deny a new trial.

So also in *United Press Association v. National Newspaper Assn.*, 254 Fed. 285 (8th Circuit), decided November 21, 1918, which was an action brought upon a breach of contract. The jury found that defendant broke the contract but awarded the plaintiff a much less sum than the undisputed evidence showed it was entitled to recover. *Held*, that the verdict was *inconsistent* and that the refusal of the trial court to grant plaintiff a new trial was an abuse of discretion.

The verdict herein is as inconsistent and uncertain as a general verdict could be. There is but one issue in the case and the jury found both ways upon the same facts submitted for its consideration upon this issue. Plaintiff in error is entitled as a mat-



ter of right to have the said issue and any and all material issues, clearly determined.

The statement of the verdict and the assignment of errors herein sets forth the elementary grounds upon which the reversal of the judgment and the granting of a new trial are sought. We respectfully submit that the decisions herein cited amply support the contention of plaintiff in error that he is entitled to a new trial and that the same should be granted as a matter of right.

Dated, San Francisco,  
April 26, 1922.

Respectfully submitted,

CHALMER MUNDAY,

ALBERT PICARD,

*Attorneys for Plaintiff in Error.*



No. 3842

IN THE  
**United States Circuit Court of Appeals**

**For the Ninth Circuit**

---

HARRY W. ELLIOTT,

*Plaintiff in Error,*

vs.

AMERICAN SURETY COMPANY OF NEW YORK  
(a corporation),

*Defendant in Error.*

**BRIEF FOR DEFENDANT IN ERROR.**

---

M. R. JONES,

JOSEPH G. DEFoREST,

*Attorneys for Defendant in Error.*

**FILED**

MAY 8 - 1922

F. D. MONKTON,  
CLERK





No. 3842

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

HARRY W. ELLIOTT,

*Plaintiff in Error,*

VS.

AMERICAN SURETY COMPANY OF NEW YORK  
(a corporation),

*Defendant in Error.*

## BRIEF FOR DEFENDANT IN ERROR.

This action by the plaintiff in error is one for damages for false imprisonment against the defendant in error as surety on the official bond of Richard R. Veale, Sheriff of Contra Costa County, California.

No special damages are alleged, but the plaintiff in error merely asks for general damages for injury to his good name and reputation and for shame, disgrace and humiliation attendant upon such arrest, and alleges that he has suffered in mind and body thereby. The answer of the defendant sets up probable cause as a defense and denies that plaintiff was damaged.

The case was tried before the Southern Division of the United States District Court for the Northern District of California, and the trial was concluded before a jury on the 21st day of November, 1921.

It may be taken as beyond question that the jury were properly instructed by the Court, as no instructions have been attacked by the plaintiff in error. The jury rendered the following verdict:

“We, the jury, find in favor of the defendant, *provide*, however, we award the plaintiff seven hundred and fifty dollars damages.”

The Court entered its judgment upon the verdict in favor of plaintiff in the sum of \$750.00 and costs.

A number of errors are assigned by the plaintiff in error, but, as stated by counsel in their brief, there is really only one question before this Court, and that is, whether or not the verdict of the jury in this case is a sufficient verdict to justify the judgment entered.

---

### Argument.

It is our contention that the verdict can only be read as a verdict in favor of plaintiff in the sum of \$750.00. The jury deliberated upon the evidence and found the damages suffered by the plaintiff to be measured by the amount awarded him.

At the outset we might say that there is a marked line of distinction between *what the jury meant by*

*their verdict and why they couched the verdict in the language quoted.* No one can read this verdict without instantly coming to the conclusion that the jury intended to and did award plaintiff the sum of \$750.00 as damages for false imprisonment. We are confident that one can neither read into the verdict any other meaning nor can one give it any other sensible interpretation.

If we should speculate as to *why* the jury couched the verdict in the language which they have, we might venture a score of guesses, one equally convincing as the other, but when it comes to the matter of *what the jury intended*, that intent is clearly set forth.

A verdict of a jury after a trial should not be lightly set aside, and especially where there is not one word of criticism by counsel concerning irregularity of the trial, admission of evidence, or any other incident to which they take exception.

The rule is clearly stated in *27 Ruling Case Law*, page 858, Section 30, being a portion of the very paragraph quoted in the brief of plaintiff in error on file herein, and is as follows:

“Although defective in form, if it substantially finds the question in issue in such a way as will enable the Court to intelligently pronounce judgment thereon for one or the other parties according to the manifest intention of the jury, *it is sufficiently certain.* \* \* \* Moreover, every reasonable construction should be adopted for the purpose of working the verdict into form so as to make it serve.”

This same rule in different language is stated in 38 *Cyc.* 1877, as follows:

“A verdict will not generally be held invalid for mere informality if its meaning is sufficiently intelligible to be the basis of a legal judgment, or if it can be made definite and certain without resorting to facts *aliunde*, as by a reference to the pleadings, evidence or record. If possible a construction will be given to the verdict which will make it effective rather than void, *ut res magis valeat quam pereat*; but a verdict is bad where it is so uncertain that it cannot be clearly ascertained what, if any, issues were passed on by the jury \* \* \*.”

In 29 *Am. & Eng. Encyc. of Law*, 2nd Ed., page 1017, the following appears:

“Courts are inclined to favor the validity of a verdict, and no matter what requisite may be apparently lacking, it will be supported if, from the terms of the finding and the contents of the record, enough material can be gathered for the formation of a complete verdict in all its essential details.”

And again, in 29 *Am. & Eng. Encyc. of Law*, 2nd Ed., page 1038:

“The form of a verdict seems to be immaterial so the intention of the jury is sufficiently apparent. Irregularities or peculiarities of expression and technical inaccuracies will alike be disregarded if the verdict, notwithstanding these defects, is intelligible.”

In *Kelly v. Bell*, 172 Ind. 591, at 597, the Court says:

“The rule in this State is that a motion for a *venire de novo* will not be sustained unless



the verdict is so defective and uncertain upon its face that no judgment can be pronounced upon it. A verdict, however informal, is good if the Court can understand it. It is to have a reasonable construction and must not be avoided except from necessity."

In *Pittsburg C. C. & St. L. Ry. Co. v. Darlington*, 111 S. W. 360(Ky.), the Court, after stating that juries are gathered from every walk of life and that their verdicts were rarely couched in the terminology of the law, says:

"Hence Courts view the findings of the jury with great leniency and every reasonable presumption is indulged in aid of a general verdict. The main thing is to get an understanding of what the jury intended. Their intent is to be sought for in the language they used in their verdict *interpreted in the light of the record*. Resort may be had to the pleadings or other parts of the record to see what the jury meant by their verdict."

In *Dunlop v. Hayden*, 29 Ind. 303, in an action for money alleged to have been fraudulently obtained by the defendant, the jury rendered a verdict as follows:

"We, the jury, find for the plaintiff and assess his damages at \$275.00. The jury in their verdict decline to impute improper motives to the defendant in the matter in controversy."

It was held by the Court that this was not an irregular or inconsistent verdict, the Court on page 304 saying:

"Even, however, if the latter clause was a finding, it would be the duty of this Court to

let the general verdict stand if by any hypothesis it could be reconciled with the special finding.”

*Weaver v. City of Cherryvale*, 170 Pac. 997 (Kan.), was a case where the plaintiff sued the city for negligence in the maintenance of a sidewalk, by reason of which plaintiff sustained injuries. She was awarded a verdict for \$675.00. The jury also made findings showing that the plaintiff was contributorily negligent, but the Court held that there was no conflict between the findings and the verdict.

In *People v. Holmes*, 118 Cal. 444, defendants were jointly indicted and tried for murder. They were convicted of involuntary manslaughter and sentenced to the State penitentiary. It was claimed that the verdict was erroneous, and the portion with which we are concerned read as follows:

“Second. We find a verdict of ‘guilty’ against all the others named in the indictment, to wit, against James Holmes, William Starr, D. Dunn, Neal Collins, W. Dowling, E. G. Waltz, and Walter McCoy, and find a verdict of ‘involuntary manslaughter’, ‘not a felony’, as charged and laid down by the court under the head of ‘involuntary manslaughter’, and pray the extreme mercy of the court in its sentence and punishment; and so say we all.”

The Supreme Court in passing upon this verdict says:

“It is certainly informal, and the words ‘not a felony’, if given effect, contradict the words ‘guilty of involuntary manslaughter’, which is a felony. \* \* \* But whatever may have

been the intention of the jury, by no possible construction could we reach the conclusion that the jury meant to acquit the defendants. \* \* \* There is no good reason why the verdict of a jury cannot have a reasonable construction and be given effect according to its manifest intention. The words 'not a felony' should be rejected as surplusage and the general verdict of 'guilty of involuntary manslaughter' should stand as the verdict."

In *Bastlethor v. Lewis*, 68 N. W. 875 (Wis.), the Court held that a verdict is sufficient, though uncertain on its face, when it is rendered certain by being construed in connection with the issues joined by the pleading.

Considered in the light of the foregoing authorities and the illustrations referred to, it will be seen that the verdict in question granted to plaintiff in error full damages as assessed by the jury and should not be set aside merely by reason of the use of an ill-advised expression by the jury when their intent is perfectly clear.

As the plaintiff in error has brought no objections to this Court to any evidence produced at the trial, no exceptions to any ruling or instruction of the Court, no claim of any irregularity in the course of the trial, it must be taken conclusively that the issue in the case was fully and fairly tried and presented to the jury; that they were properly instructed by the Court as to the law applicable to the case, and that after deliberation they found the plaintiff entitled to damages in the sum of \$750.00.

There can be no question but that the jury fixed plaintiff's damages at \$750.00, because they so state in their verdict. All the plaintiff prayed for in his complaint was money damages, and the only grievance that he can possibly have is that the award was too small, and the sufficiency of the amount should not be attacked in this proceeding where the intention of the jury is so clear as set forth in the verdict in question.

If the jury had not mentioned the word "defendant" in the verdict there cannot be the slightest presumption that plaintiff in error would have received a larger award. He would still be as he is now, the winning party; he is really in no way prejudiced by the verdict, because he has been awarded all the jury says he is entitled to.

We are not considering a writ of error prosecuted by the defendant, the losing party, but by the plaintiff, the prevailing party, who has received at the hands of the jury, after a fair trial, just what he asked—a money judgment—and the jury awarded him what in their judgment he was entitled to. We contend that the plaintiff in error cannot attack the verdict or judgment in this proceeding; that the attack, if at all, must be upon the judgment on the ground that it is not justified by the verdict; that the Court did not properly interpret or construe the verdict in the entry of the judgment.

But such attack is not open to the plaintiff in error, because he is the prevailing party; if any



error was made by the Court in construing the verdict, such error was favorable to plaintiff in error.

We do not want to be understood to claim that a party may never complain of a *judgment* in his favor, but only that such complaint must be made in the proper manner. But what we do contend is that a party cannot complain of an *error* favorable to himself.

“Error favorable to an appellant cannot be reviewed, whether or not it appears in the verdict, findings, conclusions of law, or judgment or decree” \* \* \*.

4 C. J. 921-922, Sec. 2892.

“Error in the form and not in the substance of a verdict is not grounds for reversal. Nor in any event will a judgment be reversed for error in a verdict, whatever its character, if it is not prejudicial to appellant.”

4 C. J. 1054, Sec. 3038.

And the same rule is announced by Section 475 *Code of Civil Procedure* of this State, as follows:

“The court must, in every stage of an action, disregard any error, improper ruling, instruction, or defect, in the pleadings or proceedings, which, in the opinion of said court, does not affect the substantial rights of the parties. No judgment, decision, or decree shall be reversed or affected by reason of any error, ruling, instruction, or defect, unless it shall appear from the record that such error, ruling, instruction, or defect was prejudicial, and also that by reason of such error, ruling, instruction, or defect, the said party complaining or appealing sustained and suffered substantial injury, and that a different result would have been

probable if such error, ruling, instruction, or defect had not occurred or existed. There shall be no presumption that error is prejudicial, or that injury was done if error is shown."

It is possible that the defendant in error, the loser in this action, could complain of an alleged error of the Court in construing the verdict in this case, as such construction, if erroneous, would be prejudicial to it, but the plaintiff in error cannot complain because the error, if any, was favorable to him.

---

#### CASES CITED IN BRIEF OF PLAINTIFF IN ERROR.

Plaintiff in error cites from *27 Ruling Case Law*, page 858, paragraph 30, to the effect that a jury cannot find for both plaintiff and defendant, but an examination of the rest of the text and cases cited will not uphold the ruling.

In *Grotton v. Glidden*, 84 Me. 589, cited by counsel, defendant was charged with assault and battery. The jury found the defendant not guilty in the form and manner charged, but assessed damages in favor of the plaintiff in the sum of \$50.00. The Court instructed the jury to correct the form of their verdict, and they then brought in a general verdict for plaintiff in the sum of \$50.00. The only point decided in that case was that the Court may instruct the jury to correct a verdict if it is not in proper form. The case does not hold that a judgment for plaintiff could not have been entered upon that verdict.

*East St. Louis Cotton Oil Co. v. Skinner Bros. Mfg. Co.*, 249 Fed. 439, from which counsel quotes at length, is plainly distinguishable from the case at bar. That case was an action on an open account for the reasonable value of labor and services. Defendant counterclaimed for breach of an alleged contract. The jury found that the defendant was indebted to plaintiff for the sum of \$4594.79, and further found damages for defendant under the counterclaim, in the sum of \$1000.00. So the jury found in effect that there was an open account running to plaintiff, and no special contract, and then followed a finding that there was a special contract breached by the plaintiff. This is a very different situation from the case at bar, because the jury first finds there was no special contract, and then immediately finds that there was a contract. In other words, if they found for the open account, necessarily they must find against a special contract, and if they found that the amount stated in plaintiff's complaint was due under the open account, they could not, of course, reduce the amount of the judgment by deducting what they found due for breach of a special contract which their former finding declared did not exist. In that case plaintiff did not get all he was entitled to, while in the case at bar the jury awarded the plaintiff every dollar they thought he was damaged, and their peculiar wording did not reduce that damage in any way.

The same distinction applies to *Ruth v. McPherson*, 150 Mo. App. 694; 131 S. W. 474, because the jury found a money judgment for plaintiff, and then found a larger amount in favor of defendant by reason of plaintiff's negligence, and the judgment was the difference between the two amounts, thus resulting in cutting down one of the amounts awarded, and entirely wiping out the other.

In *Fred Bauer Engineering & Contracting Co. v. Arctic Ice & Storage Co.*, 186 Mo. App. 662; 172 S. W. 417, plaintiff sued on a contract for a stipulated price for work performed, and defendant counterclaimed, demanding damages for failure to do the work properly. The jury rendered a verdict in favor of plaintiff on its claim, and in favor of defendant on its counterclaim for a greater amount. Counsel quotes from that case, but it is evident that we can make the same distinction we have made in the two former cases, and also call the Court's attention to a further portion of the opinion immediately following the portion quoted by counsel, and reading as follows:

“Here it appears that the contract price for the erection of the tower in question was \$1300.00; \$621.29 was paid on that, and plaintiff sued for the balance of \$678.71. As the record now stands it is denied any further recovery and there is a judgment against it for \$800.00. If this is permitted to stand the plaintiff not only receives nothing for the erection of the tower, but is compelled to pay defendant \$178.71 in addition, *though the evidence in the record does not make it appear that defendant*



*suffered damages to the extent of \$1400.00 for which it ought to be compensated. It further appears that the defendant did not seek to minimize the damages as the law requires it should have done.*" (The italics are ours.)

It will be seen from the above quotation that the verdict was *inconsistent with the evidence*, and not merely questionable as to its intent.

The case of *Joseph Rosenthal v. United States of America*, referred to and quoted from by counsel on pages 10 and 11 of their brief, is certainly not in point. That was a criminal case, and there were two counts in the indictment and only one transaction. If the defendant was found guiltless on one count, it meant that he could not be guilty at all.

In *Pugh v. Bluff City Excursion Co.*, 177 Fed. 399, cited by counsel for plaintiff in error, a most casual reading of the case will show that the verdict was *inconsistent with the evidence*, and not at all inconsistent on its face, because the undisputed testimony was that the damages were much larger than the sum of \$1.00. The verdict read:

"We, the jury, find a verdict for plaintiff and fix the damages at \$1.00."

It is very evident that there is no inconsistency whatever on the face of this verdict, and therefore the case is not in point.

In *Glenwood Irrigation Co. v. Vallery*, 248 Fed. 485, there was no dispute as to the *amount* of damages, the jury returning a verdict for a smaller amount. In other words, there was no inconsis-

tency in the verdict other than that it was inconsistent with the undisputed facts before the jury.

The same comment may be made in respect to the *United Press Association v. National Newspaper Assn.*, 254 Fed. 285, cited by counsel.

Apparently a number of cases cited by counsel are only inserted in the brief because they found the words "inconsistent" used in the opinion, but a reading of these cases will show that the verdicts were inconsistent with the evidence only but were regular on the face, and of course in the case at bar there is no evidence before the Court, and necessarily it must be presumed that the evidence justified a verdict for \$750.00 for plaintiff, and neither more nor less.

In conclusion, we submit that the verdict in this case is sufficiently clear in form and substance to support the judgment; that plaintiff in error is not prejudiced thereby, and that a new trial should not be granted.

Dated, San Francisco,

May 8, 1922.

M. R. JONES,

JOSEPH G. DEFoREST,

*Attorneys for Defendant in Error.*

---

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

---

In the Matter of C. F. MASON and WM. McD.  
OWEN, co-partners, trading as MASON &  
OWEN,

Bankrupts,

C. F. MASON and WM. Mc D. OWEN,

Bankrupts,

GEORGE P. KIER, Trustee,

Appellant,

vs.

J. E. STEER,

Appellee.

---

Transcript of Record.

---

Upon Appeal from the United States District Court for  
the Southern District of California,  
Southern Division.

---

FILED  
MAY 17 1902  
F. D. MONCKTON





No.

---

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

---

In the Matter of C. F. MASON and WM. McD.  
OWEN, co-partners, trading as MASON &  
OWEN,

Bankrupts,

C. F. MASON and WM. Mc D. OWEN,

Bankrupts,

GEORGE P. KIER, Trustee,

Appellant,

vs.

J. E. STEER,

Appellee.

---

Transcript of Record.

---

Upon Appeal from the United States District Court for  
the Southern District of California,  
Southern Division.

---



## INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Assignment of Errors.....	16
Clerk's Certificate .....	23
Names and Addresses of Attorneys.....	1
Opinion .....	12
Order .....	16
Order .....	22
Præcipe .....	23
Stipulation .....	2





**Names and Addresses of Attorneys.**

For Appellant:

WILL J. THAYER, Esq., San Diego, Calif.

For Appellee:

GEORGE H. STONE, Esq., San Diego, Calif.

IN THE DISTRICT COURT OF THE UNITED  
STATES, IN AND FOR THE SOUTHERN  
DISTRICT OF CALIFORNIA,  
SOUTHERN DIVISION.

In Bankruptcy - #4165

In the Matter of C. F. MASON	)	
and WM. McD. OWEN, co-	)	
partners, trading as MASON &	)	STIPULATION
OWEN,	)	FOR RECORD
	)	ON APPEAL
C. F. MASON and WM. McD.	)	(STEER).
OWEN,	)	
	)	
Bankrupts.	)	

---

It is hereby stipulated by the undersigned as follows:—

1st. That the appeal heretofore taken herein by the Trustee, George P. Kier, and any writ of review which may be hereafter issued to review the order appealed from, shall be heard by the United States Circuit Court of Appeals for the Ninth Circuit, upon the statement of facts as herein agreed.

2nd. That the following shall comprise the record on appeal:—

STIPULATION

(a) The stipulation signed by the Trustee and George H. Stone, Esq., dated March 4th, 1921, copy of which is as follows:

“IT IS HEREBY STIPULATED, by and between Will J. Thayer, Trustee of the estate of the above-

named bankrupts, and J. E. Steer, by his attorney, George H. Stone:

“That the facts of the matter in controversy on the claim of J. E. Steer against the estate of the above-mentioned bankrupts for one hundred (100) shares of Midvale Steel stock are as follows:

“That on February 27, 1920, said J. E. Steer deposited with said Mason & Owen as his brokers, One Hundred Fifty Dollars (\$150.00), and later made an order for the purchase of one hundred (100) shares of Midvale Steel stock.

“That on or about March 20, 1920, said Mason & Owen requested Logan & Bryan, members of the New York Exchange, who were acting as brokers and agents for said Mason & Owen, to purchase upon said stock exchange, one hundred (100) shares of Midvale Steel upon Mason & Owen’s credit and account. That said Logan & Bryan did purchase on or about said date, one hundred (100) shares of Midvale Steel stock, and had a certificate issued for the same, either in the name of Logan & Bryan or to their order. That said certificate for one hundred (100) shares of Midvale Steel stock has ever since March 20, 1920, remained in the hands, and subject to the order, of Logan & Bryan, and has been retained by them under an agreement between Mason & Owen and Logan & Bryan, as security for moneys advanced by said Logan & Bryan to pay for purchase of stocks for said Mason & Owen (including the purchase of said Midvale Steel

stock), and as security for the payment of all sums Mason & Owen might owe Logan & Bryan upon said date or subsequent to that time. That said Logan & Bryan at no time prior to making loans on said stock, had any knowledge or notice of the claims of said J. E. Steer, to the one hundred (100) shares of Midvale Steel stock therein and at all times acted in good faith; and said J. E. Steer had no notice of and gave no consent for, the pledging of his said stock by Mason & Owen with Logan & Bryan, other than allowing them to hold said stock, as herein stated.

“That on March 20, 1920, said J. E. Steer received from Mason & Owen, a confirmation of their purchase of said stock at  $47\frac{3}{4}$ , a total price of \$4,775.00 plus a commission of \$22.50, or a total purchase price of \$4,797.50, and on said date, said Steer paid to Mason & Owen the balance of said purchase price and commission, namely, \$4,647.50, and received from said Mason & Owen their receipt for full payment for said stock, and ever since said date, said stock has been claimed, absolutely, by said Steer, as his own stock, fully paid, without any claim, debt, offset or trading thereon, except as herein stated, and said Steer has since said date permitted said stock to remain in the hands of said Mason & Owen’s brokers, Logan & Bryan, and that said stock is now held by said Logan & Bryan in their New York office in the account of said Mason & Owen.

“That on November 24, 1920, prior to filing of Petition in Bankruptcy against Mason & Owen, said

J. E. Steer notified Logan & Bryan, at their Los Angeles, California office, that he was the owner of one hundred (100) shares of Midvale Steel stock, for which he paid in full to Mason & Owen many months prior to November 19, 1920, and that the stock stood of record, on the books of Mason & Owen, in his name, fully paid; that said J. E. Steer, on November 20, 1920, demanded said stock from Mason & Owen, and prior thereto made no demand or request for delivery of the stock to him; that the dividends thereof were paid to him by Mason & Owen, except a \$50.00 dividend declared in January, 1921, which has not been paid to him but which is presumed to be in the hands of Logan & Bryan. Said Steer knew at all times that said stock had not been issued in his name.

"That during all the month of March, 1920, said Mason & Owen were indebted to Logan & Bryan in large sums of money, repayment of which was secured by depositing and pledging with said Logan & Bryan, certain certificates of stock, among which was the one hundred (100) shares of Midvale Steel stock, purchased March 20, 1920 by Logan & Bryan at the order of Mason & Owen, so ordered by them on the order of J. E. Steer; that said indebtedness continued and increased from that time until the filing of Petition in Bankruptcy in December, 1920, at which time Mason & Owen owed Logan & Bryan approximately \$300,000.00, to secure the payment of which, stocks and bonds of other customers of Mason & Owen to the value of about \$400,000.00 were held by and pledged



to said Logan & Bryan. That subsequent to the filing of Petition in Bankruptcy, the entire said indebtedness due Logan & Bryan was paid out of the proceeds of the sale of stocks pledged with them, but that said 100 shares of Midvale Steel stock remained unsold in their hands after payment of all claims of Logan & Bryan against Mason & Owen.

"That said Mason & Owen, during the year 1920, used for their private speculations, and lost therein, about \$55,000.00 of the money deposited with them by their clients and customers, so that the assets of the copartnership were to about that amount insufficient to redeem all certificates pledged with Logan & Bryan, and to pay all their customers and clients the sums of money due them.

"That at the time of filing Petition in Bankruptcy, so far as the records and books of said Mason & Owen show, one hundred (100) shares of Midvale Steel stock was the only Midvale Steel stock held by Mason & Owen, or Logan & Bryan for Mason & Owen, and as shown by said books no one other than J. E. Steer was "long" on Midvale Steel stock, or had any claim against said Mason & Owen for any Midvale Steel stock, and there has been no claim filed to this date against the estate of said bankrupts for any Midvale Steel stock other than J. E. Steer.

Dated March 4th, 1921.

Will J. Thayer,  
Trustee

George H. Stone,  
Attorney for J. E. Steer."

(b) The securities held by Logan & Bryan consisted partly of stocks purchased on margin and partly of stocks paid for in full to Mason & Owen. That the proceeds of the securities held on margin was more than sufficient to pay the Logan & Bryan indebtedness in full and were the only ones sold by Logan & Bryan to liquidate their claim. That 21 securities were not sold and survived the liquidation, including 100 Midvale claimed by Steer, and prior to December 1, 1920, all said 21 securities had been fully paid for to Mason & Owen and no trades were pending, being the testimony of the Trustee.

(c) Two letters and two telegrams, the letters being one from Will J. Thayer to Logan & Bryan, signed by L. V. Sterling, their reply thereto, dated October 14th, 1921, a telegram from said Thayer to Logan & Bryan, their reply thereto, and the stipulation signed by George H. Stone and Will J. Thayer referring to said letters and telegrams, copies of which are as follows:-

"462 Spreckels Bldg.,  
San Diego, Cal.  
October 6, 1921.

Messrs. Logan & Bryan,  
Stock-brokers,  
New York, N. Y.

Attention: Mr. Louis V. Sterling.

---

Gentlemen:-

On March 20th, 1920, Mason & Owen purchased from you 100 shares of Midvale at 47¾. This pur-

chase was made by Mason & Owen on the order of J. E. Steer and litigation has arisen between Mr. Steer and the Trustee for Mason & Owen who, as you know, are now bankrupts. As between Steer and Mason & Owen it was the intention of Steer, apparently, that the purchase should be made for cash but we understand that as a matter of fact you purchased the stock for Mason & Owen for their account as in all of the marginal purchases made by Mason & Owen from time to time.

Unless an agreement can be made between Steer and the Trustee for the Bankrupts in regard to the facts connected with the purchase of said 100 shares of Midvale it will be necessary for us to take the deposition of your Mr. Sterling but, as the facts are actually undisputed, I am writing to you to ask if you will explain to me the manner in which the purchase of the 100 shares of Midvale was made and I believe I can get the attorneys for Mr. Steer to accept your letter as a correct statement of the facts and thus avoid the taking of a deposition.

My understanding of the transaction is as follows: Mason & Owen sent to you an order to purchase 100 shares of Midvale for their account at  $47\frac{3}{4}$  but did not send any money to apply on that particular purchase and your firm had no knowledge of any kind regarding the transaction between Steer and Mason & Owen and did not know that the stock was being purchased for any one but for Mason & Owen and that the money used in the purchase of said shares

was furnished by your firm as a loan to Mason & Owen and at the time the purchase was made the net result of it was that the general indebtedness of Mason & Owen to you was increased by the amount of the purchase price of the 100 shares of Midvale plus your commission,

I also understand it to be a fact that at no time was any part of the monies sent to you by Mason & Owen applied to the purchase price of any particular security—that all monies received by you from Mason & Owen were applied on the general indebtedness of Mason & Owen to you.

The precise point I am trying to arrive at is - - that Logan & Bryan did not purchase the 100 shares of Midvale for Steer and did not apply any of the money sent to you by Mason & Owen to the 100 shares of Midvale or to any particular security, but that all monies remitted by Mason & Owen were received by you and simply credited on the general indebtedness owing by Mason & Owen.

I would appreciate it very much if you would advise me exactly how the Midvale stock was purchased—having in mind the particularly points as above outlined.

Yours truly,

Will J. Thayer,

Trustee for Mason & Owen.



"LOGAN & BRYAN"

#42 Broadway, New York,

October 14, 1921.

Will J. Thayer, Esq.

Attorney for Trustee of Mason & Owen,

462 Spreckels Building,

San Diego, Cal.

Dear Sir:-

Replying to your letter of October 6th, we beg to state that Mason & Owen never purchased any stock from us, but purchased stocks through us.

Mason & Owen sent us an order on March 20th, 1920, by telegram, to purchase one hundred shares of Midvale stock for them. We immediately executed the order on the New York Stock Exchange by purchasing one hundred shares of Midvale for Mason & Owen at Forty-seven and 75/100 Dollars (\$47.75) per share, and immediately notified Mason & Owen, by wire, that we had done so. We advanced for Mason & Owen Four Thousand Seven Hundred and Seventy-five Dollars (\$4,775.), the purchase price of said shares, which money we advanced as a loan to Mason & Owen and charged it to their account, together with Fifteen Dollars (\$15.), commission for making such purchase. The net result of the transaction was that the general loan indebtedness then owing by Mason & Owen to us was increased by Four Thousand Seven Hundred Seventy-five Dollars (\$4,775.), the amount of the purchase price of the one hundred shares of Midvale stock,



plus our commission, making a total of Four Thousand Seven Hundred Ninety Dollars (\$4,790.).

At the time we purchased the Midvale stock above referred to, we had no knowledge, and never since then had any knowledge of any kind that the stock was being purchased for anyone but Mason & Owen.

Whatever moneys we received from time to time from Mason & Owen, on account of stocks purchased by us for them, were credited to the general account of Mason & Owen with us, that is, were credited on the indebtedness which Mason & Owen owed us.

If you wish to take my deposition or that of anyone else connected with our firm or our office, you can do so at the offices of our counsel Messrs. Wollman & Wollman, 20 Broad Street.

Very truly yours,

L. V. Sterling."

"San Diego, 10/24/21.

Louis V. Sterling,  
care Logan & Bryan,

New York, N. Y.      Telegram

Referring to your letter of 14th did Mason & Owen ever request Logan & Bryan to apply any money to the purchase price of the Midvale stock other than making remittances on general account as stated in your letter.

Kindly reply by night letter.

Will J. Thayer."

"1921 Oct. 25 P.M. 1 14

New York, N. Y.

Will J. Thayer,  
462 Spreckels Bldg.,  
San Diego, Calif.

Mason & Owen did not request us to apply any money to purchase price of Midvale stock all remittances were applied on their general debit balance.

Logan and Bryan"

### STIPULATION.

"It is stipulated that the letter from L. V. Sterling of New York of Oct. 14, 1921, addressed to Will J. Thayer, and Logan & Bryan's telegram of date Oct. 25, 1921, may be received as evidence of the matters therein stated and that said letter and telegram were in reply to letter from Will J. Thayer, dated Oct. 6 and of telegram of Oct. 24, which may be submitted as interrogatories only.

Nov. 1, 1921.

Will J. Thayer  
George H. Stone."

(d) The evidence referred to at Paragraph 3 herein, subject to the objection there noted.

(e) The order and opinion of Judge Bledsoe directing the delivery of 100 shares of Midvale Steel stock to J. E. Steer, copies of which are as follows:-

### OPINION.

"Bledsoe, District Judge:- The claimant, J. E. Steer, makes application for the delivery to him by

the Trustee in Bankruptcy of one hundred shares of Midvale Steel Stock, together with accrued dividends, etc. The case has been before the Court on two *previous* occasions, an appeal being had each time from a ruling of the Referee in Bankruptcy. On its last appearance here the Court endeavored to indicate that Steer was entitled to the stock claimed unless it should be the fact, which the Referee was directed to ascertain, that the one hundred shares of Midvale Steel had been pledged to Logan and Bryan by the Bankrupts as for some specific indebtedness and that other stocks held by Logan and Bryan, pledged by the Bankrupts, had been sold to satisfy such specific indebtedness. The suggestion was also indulged in that if it were impossible to ascertain the amount for which the Steer stock was actually pledged that then Steer, being in equity to be regarded as the owner thereof, the same should be delivered to him free of any charge as for a contribution, etc.

“The Referee now, by his latest report, indicates that pyament to the conclusion that the money paid by Steer to Mason & Owen, the Bankrupts, as for the purchase price of the Midvale stock was a part of the \$55,000. lost by Mason and Owen in the year 1920 in their private speculations as shown in the agreed statement of facts, and that in consequence Steer should pay such proportion of said \$55,000 as the amount paid by him bore to the aggregate value of the securities belonging to Mason & Owen, held by Logan and Bryan.

“The difficulty with this conclusion is that there is nothing in the evidence to sustain it. The stipulation filed herein on the first hearing merely shows, “that said Mason and Owen, during the year 1920, used for their private speculations, and lost therein, about \$55,000 of the money deposited with them by their clients and customers, so that the assets of the co-partnership were to about that amount insufficient to redeem all certificates pledged with Logan and Bryan, and to pay all their customers and clients the sums of money due them.”

“The facts of the case have really never been presented to the Court in their *entirely*, at least to this Court, the agreed statement of facts being inconclusive in its nature. It isn't yet made apparent to the Court what was done by Mason and Owen with the money received from Steer and which he paid, expecting it would be applied on the payment of the one hundred shares of Midvale Steel, which he had ordered. In the absence of any evidence it is to be presumed of course that Mason and Owen did the thing required of them, that is, paid this amount of money on account of the purchase price of the Steer stock, rather than that they embezzled it, that is, used it for their own private speculations. While the agreed statement of facts shows that of the money deposited with them by their clients and customers generally, they used in their own private speculations and lost, about \$55,000, it does not show that the Steer money was



a part of this sum, and in the absence of evidence to that effect, the Court has no right to assume that such is the case.

“It is also apparent from the evidence received at the last hearing that the money forwarded by Mason and Owen to Logan and Bryan was applicable upon the indebtedness owing by them to Logan and Bryan generally. In the light of this, therefore, it is to be presumed that the money paid by Steer to the Bankrupts was actually transmitted to Logan and Bryan by the Bankrupts and credited upon their account. In such event there was a complete payment by Steer, through his agents, Mason and Owen, such as to entitle him to claim the stock as his own and there being no showing of any hypothecation of this particular stock for any particular sum which some other stock also hypothecated was sold to satisfy, it must follow that he is entitled to have the stock free of any claims by way of contribution or otherwise.

“In the light, therefore, of the present state of the record, including the evidence on the one hand and the lack of evidence on the other, the following order will be made by the Court as a final determination of this controversy:

“Logan and Bryan, if they still retain possession of the same, or the Trustee herein, if he now has possession of the same, are, and each of them is, directed to deliver to said J. E. Steer, or his order, the one hundred shares of Midvale Steel Stock purchased by Logan and Bryan upon the order of Mason & Owen,



together with all accrued dividends thereon, received and retained by Logan and Bryan or by said Trustee.

Bledsoe

---

United States District Judge."

ORDER

"The above entitled matter coming on to be heard upon the application of J. E. Steer for a delivery to him of one hundred shares of Midvale Steel Stock, purchased by Logan and Bryan, for, and upon the order of, Mason and Owen,

"IT IS NOW ORDERED by the Court that Logan and Bryan, if they still retain possession of the same, or the Trustee herein, if he now has possession of the same, are, and each of them is, directed to deliver to said J. E. Steer, or his order, the one hundred shares of Midvale Steel Stock purchased by Logan and Bryan upon the order of Mason and Owen, together with all accrued dividends thereon, received and retained by Logan and Bryan or by said Trustee.

Bledsoe

---

United States District Judge."

(f) The assignment of errors filed by said Trustee, copy of which is as follows:-

ASSIGNMENT OF ERRORS

"Now comes George P. Kier, as trustee for said bankrupts, and files the following assignment of errors,

upon which he will reply upon his prosecution of the appeal in the above entitled cause, from the order and decree referred to in his petition for appeal this day filed:

I.

“That the above named court erred in granting the petition of J. E. Steer on file herein, praying for the delivery to him of 100 shares of stock of the Midvale Steel and Ordnance Company.

II.

“Said court erred in directing the delivery to said Steer of said shares of stock.

III.

“Said court erred in directing the payment or delivery to said Steer of any dividends in any amount whatsoever.

“WHEREFORE, appellant prays that said order and decree be reversed in all things and that said District Court be ordered to enter a decree reversing its aforesaid decision in all things.

“Dated: This 7th day of February, 1922.

Will J. Thayer

---

Attorney for said Trustee,  
George P. Kier.”

3rd. That at the hearing the petitioner, J. E. Steer, offered in evidence a copy of the stenographic notes of the testimony given by Charles F. Mason at the first meeting of the creditors of said Bankrupts, held

before the Referee in Bankruptcy, the copy of the material parts of which notes is as follows:—

“Q. Did you tell Mr. Allen that those two accounts, the one in the grain and the other in the stock were owned by the same party? A. Yes Sir, Mr. Allen knew it.

Q. Under what name did you deal in grain? A. H. O. Maxwell.

Q. But sometimes, in the Maxwell account, you were long \$50,000 or \$60,000. It took money to carry on that account. Where did you get the money? A. Mason & Owen in New York.

Q. You took the customers' money, didn't you? A. No sir.

Q. What money was it, then? A. Mason & Owen's money which was to our credit in New York.

Q. That was customers' money wasn't it? A. No sir.

Q. You got it from the customers? A. It was our money, on deposit there.

Q. Where did you get it then, if you didn't get it from the customers? A. It was money deposited with us and we sent it to New York to our credit.

Q. Answer my question. Where did you get it if you didn't get it from the customers? You ought to be able to answer that question. A. My answer is, it was money deposited with us which we went to New York to our credit.

Q. Did you use any of the customers' securities as a margin in the Maxwell account? A. No sir.

Q. You say you did not use any of the customers' securities as a margin in the Maxwell account? A. I can't answer that question because it is all one big account in New York. All of the money in New York was in one account; now just what proportion of that was security, I don't know.

Q. How much money did you put in in October 1920, to Mason and Owen? A. The account in New York covered it, is all I can say.

COURT: He is asking you about what was deposited here.

A. Everything that was deposited here was sent to New York.

BY MR. CAREY: Then it is these stocks bought on margin that are retained by Logan & Bryan as their security to protect themselves against loss? A. Yes.

BY MR. THAYER: Q. And they also retain stocks paid for in cash to protect your account? A. Not necessarily. Where the client has not ordered the certificate delivered, - in other words, that list of stock there you show was paid for, Logan & Bryan had that stock ready to be delivered on the price which the client said, providing our margin was in good shape.

Q. Providing your margin was not in good shape, they were to refuse delivery, were they? A. If the margin was not in good shape, they would not deliver the stock, that is true; they kept themselves protected always.

Q. And that would apply to Mr. Steer's 100 Midvale, wouldn't it? If it had been in that shape, under your arrangement with Logan and Bryan isn't it true that Logan and Bryan had a right to hold back stock although it was fully paid for, here in San Diego? A. If our account was not properly protected in New York.

Q. Here is this Steer stock; that was handled through you personally wasn't it? A. Yes sir.

Q. What was the history of that transaction? A. He came into the office and ordered 100 shares of Midvale Steel, paid the usual deposit, and the next day or shortly thereafter, paid the balance of the stock. We notified him the stock was bought and he paid the price for it.

Q. Whom did he pay it to? A. I think to me, probably, the following day; he probably gave us a check.

Q. That was a deal between you and him, was it not? A. I think so.

Q. That is the best of your recollection? A. The best of recollection is this: Mr. Steer ordered 100 shares of Midvale Steel.

Q. Did he deal through you in that order? A. I think that is right. It was sent to New York and the stock bought and we gave him the usual memorandum showing it was purchased."

The Trustee objected to the receipt of the aforesaid copy of said stenographic notes on the ground



that the same was heresay and incompetent, irrelevant and immaterial, which objection was sustained by the Referee, and claimant insists that said evidence should be part of the record on appeal.

Will J. Thayer

---

Attorney for the Trustee.

George H. Stone

---

Attorney for J. E. Steer.

The foregoing stipulation is approved.

Bledsoe

Judge.

[Endorsed]: In Bankruptcy - # 4165 District Court, United States, Southern District of California, Southern Division. In the Matter of C. F. MASON and M. McD. OWEN, co-partners, trading as MASON & OWEN, Bankrupts, C. F. MASON and WM. McD. OWEN, Bankrupts. STIPULATION FOR RECORD ON APPEAL. (STEER) FILED MAR - 7 1922 at 17 min. past 10 o'clock A. M. Chas. N. Williams, Clerk R S Zimmerman Deputy Will J. Thayer, Attorney for George P. Kier, Trustee, # 462 Spreckels Building, San Diego, Calif.

IN THE DISTRICT COURT OF THE UNITED  
STATES, IN AND FOR THE SOUTHERN  
DISTRICT OF CALIFORNIA  
SOUTHERN DIVISION.

In the Matter of )  
C. F. Mason and Wm. McD Owen, )  
co-partners trading as ) 4165 Bcy.  
Mason & Owen, Bankrupts. )

ORDER.

The above entitled matter coming on to be heard upon the application of J. E. Steer for a delivery to him of one hundred shares of Midvale Steel Stock, purchased by Logan and Bryan for, and upon the order of, Mason and Owen,

IT IS NOW ORDERED by the Court that Logan and Bryan, if they still retain possession of the same, or the Trustee herein, if he now has possession of the same, are, and each of them is, directed to deliver to said J. E. Steer, or his order, the one hundred shares of Midvale Steel Stock purchased by Logan and Bryan upon the order of Mason and Owen, together with all accrued dividends thereon, received and retained by Logan and Bryan or by said Trustee.

Bledsoe

United States District Judge.

February 1, 1922

[Endorsed]: No. 4165 Bkey IN THE DISTRICT COURT OF THE UNITED STATES for the Southern District of California Southern Division. In the Matter of C. F. Mason and Wm. McD. Owen, co-partners trading as Mason and Owen. Order FILED FEB 1 - 1922 at 50 min. past 4 o'clock P. M. Chas. N. Williams, Clerk Murray E Wire deputy

UNITED STATES OF AMERICA, DISTRICT  
COURT OF THE UNITED STATES,  
SOUTHERN DISTRICT OF  
CALIFORNIA.

*In Re* Mason & Owen,  
Bankrupts. } CLERK'S OFFICE  
No. 4165  
PRÆCIPE

*To the Clerk of Said Court:*

*Sir:*

*Please print* stipulated record on appeal (Steer case) including decree in Steer case & transmit original citation to Circuit Court of Appeals, 9th Cir. signed by Judge Rudkin

Will J Thayer

Atty for Trustee

Mch 6, 1922.

IN THE DISTRICT COURT OF THE UNITED  
STATES, SOUTHERN DISTRICT OF  
CALIFORNIA, SOUTHERN  
DIVISION.

In the Matter of C. F. MASON )	
and WM. McD. OWEN, co- )	
partners, trading as MASON & )	
OWEN, )	CLERK'S
Bankrupts, )	CERTIFICATE
C. F. MASON and WM. McD. )	
OWEN, )	
Bankrupts. )	

I, CHAS. N. WILLIAMS, Clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 24 pages, numbered from 1 to 24 inclusive,

to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the stipulation for record on appeal, order of Judge Bledsoe and praecipe.

I DO FURTHER CERTIFY that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to \_\_\_\_\_, and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this \_\_\_\_\_ day of March, in the year of our Lord One Thousand Nine Hundred and Twenty-two, and of our Independence the One Hundred and Forty-sixth.

CHAS. N. WILLIAMS,

Clerk of the District Court of the  
United States of America, in and  
for the Southern District of California.

By

Deputy.

**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

---

In the Matter of C. F. MASON and WM. McD.  
OWEN, co-partners, trading as MASON &  
OWEN,

Bankrupts,

C. F. MASON and WM. McD. OWEN,

Bankrupts,

GEORGE P. KIER, Trustee,

Appellant,

VS.

J. E. STEER,

Appellee.

---

**Appellant's Brief**

---

Upon Appeal from the United States District Court for the  
Southern District of California,  
Southern Division

---

WILL J. THAYER,  
*Appellant's Attorney,*  
San Diego, California





IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

---

In the Matter of C. F. MASON and WM. McD.  
OWEN, co-partners, trading as MASON &  
OWEN,

Bankrupts,

C. F. MASON and WM. McD. OWEN,

Bankrupts,

GEORGE P. KIER, Trustee,

Appellant,

vs.

J. E. STEER,

Appellee.

---

## Appellant's Brief

---

Upon Appeal from the United States District Court for  
the Southern District of California,  
Southern Division

---

### STATEMENT OF THE CASE.

This is an appeal from an order entered in the matter of Mason & Owen, Bankrupts. The appellee, Steer, sought to recover from the Trustee of the Bankrupts 100 shares of Midvale Steel stock which had been purchased by Mason & Owen, stock brokers, and which were in the possession of Logan & Bryan in New York City, who were holding same until the dispute between Steer and the Trustee should be determined, Logan &

Bryan making no claim to the stock at the time this proceeding was begun.

The lower court held that the stock should be delivered to Steer and it was so ordered. (Record 22.)

The record in this case was prepared pursuant to stipulation (Record 2) which stipulation contains the stipulation upon which the case was submitted to the lower court, together with additional evidence hereinafter referred to.

### ESSENTIAL FACTS.

The essential facts are that Mason & Owen were, in the spring of 1920, engaged in business in San Diego as stockbrokers and on February 27, 1920, Steer deposited with them, as his brokers, \$150, and later directed them to buy 100 shares of Midvale Steel stock.

On March 20, 1920, Mason & Owen requested Logan & Bryan, members of the N. Y. Stock Exchange, and who were the agents of Mason & Owen, to purchase 100 shares of Midvale upon the credit and account of Mason & Owen, which Logan & Bryan did forthwith, taking the stock certificate in the name of Logan & Bryan, or to their order. (Record 3.)

The purchase price of the stock, \$4,775.00, was advanced *in toto* by Logan & Bryan as a *loan to Mason & Owen*, and was charged to their account, together with Logan & Bryan's commission of \$15.00 for making the purchase. (Record 10.) That said certificate for 100 shares of Midvale Steel stock ever since March 20, 1920, remained in the hands, and subject to the order of Logan & Bryan, and was retained by them under an agreement between Mason & Owen and Logan & Bryan, as *security for moneys advanced by said Logan & Bryan*

to pay for purchase of stocks for said Mason & Owen (*including the purchase of said Midvale Steel stock*), and as security for the payment of *all* sums Mason & Owen might owe Logan & Bryan upon said date or *subsequent* to that time. That said Logan & Bryan, at no time prior to making loans on said stock, had any knowledge or notice of the claims of said Steer to the 100 shares of Midvale Steel stock, and at all times acted in good faith; and said Steer had no notice of and gave no consent for, the pledging of his said stock by Mason & Owen with Logan & Bryan, other than allowing them to hold said stock, as herein stated.

On March 20, 1920, Mason & Owen falsely represented to Steer that they had executed his order for the purchase of the stock and Steer thereupon paid them \$4,647.50, taking their receipt for full payment, and he has ever since claimed to own the stock without any lien against it of any kind, except that he knew that the stock had not been issued in his name (Record 5) and he permitted the stock to remain in the hands of Mason & Owens' brokers, Logan & Bryan, (Record 4) he being ignorant of the pledge.

Mason & Owen *never applied any of Steer's money to the purchase price of the Midvale stock*, but all remittances made by them, if there were any, were applied by Logan & Bryan upon Mason & Owens' general indebtedness. (Record 11 and 12.)

At the time the Midvale stock was purchased Mason & Owen were indebted to Logan & Bryan in large sums of money, repayment of which was secured by pledging to Logan & Bryan the 100 shares of Midvale. That said indebtedness continued and increased until the filing of

the petition in bankruptcy in December, 1920, at which time the indebtedness amounted to approximately \$300,000.00, secured by stocks of the value of \$400,000 belonging to the customers of Mason & Owen, including the Midvale stock. (Record 5.)

The effect of the purchase of the Midvale stock was to *increase the burden of the loan* against these customers' stocks by \$4,775.00. (Record 10.)

Mason & Owen were Steer's agents and *failed in their duty to apply Steer's money to the purchase price of the Midvale stock*, and Steer now claims that he should not suffer because of the malfeasance of his agents, but that the loss caused to him by their acts should be charged against the *other* customers of Mason & Owen, and that the *entire* indebtedness due to Logan & Bryan should be paid out of the proceeds of the stocks belonging to the *other* customers of Mason & Owen, thus releasing Steer's stock from the lien of the general pledge to Logan & Bryan.

That subsequent to the filing of the Petition in Bankruptcy, the entire indebtedness due Logan & Bryan was paid out of the proceeds of the sale of stocks pledged with them, but that said 100 shares of Midvale Steel stock remained unsold in their hands after payment of all claims of Logan & Bryan against Mason & Owen.

The securities held by Logan & Bryan consisted partly of stocks purchased on margin and partly of stocks paid for in full to Mason & Owen. The proceeds of the securities held on margin were more than sufficient to pay the Logan & Bryan indebtedness in full and were the only ones sold by Logan & Bryan to liquidate their claim. That 21 securities were not sold and survived the liqui-



dation, including 100 Midvale claimed by Steer, and prior to December 1, 1920, all said 21 securities had been fully paid for to Mason & Owen.

Mason & Owen used for their private speculations about \$55,000 of the monies deposited with them by their customers so that their assets were to that amount insufficient to pay off the Logan & Bryan indebtedness. (Record 14.)

#### **NET RESULT OF SELLING THE PLEDGED STOCKS.**

The net result of the sale of the securities held by Logan & Bryan was that the stocks of the other customers of Mason & Owen were sacrificed to pay off the *entire* indebtedness due to Logan & Bryan, including that part of the indebtedness (\$4,775.00) *caused by the purchase of the Midvale stock*, thus releasing the stock claimed by Steer, and Steer now claims the right to receive his stock *without paying any portion of the Logan & Bryan indebtedness.*

#### **SPECIFICATION OF ERRORS.**

Appellant assigns as error that the court directed the delivery of said stock to Steer unconditionally and directed the payment of dividends to Steer.

#### **CONTENTIONS OF APPELLANT.**

The contentions of appellant which will be discussed in their order, are as follows:

(a) That Steer is estopped to demand his stock unconditionally because he permitted same to be issued in the name of another person, and money was loaned on it in good faith and he is bound by the acts of his agents whom he clothed with the *indicia* of ownership.

(b) That Steer's order to his agents, Mason & Owen, was to make an outright purchase of the stock; that Mason & Owen failed to purchase the stock outright, as directed by Steer, but purchased it as a *marginal* purchase with monies advanced by Logan & Bryan; that such a purchase was not an execution of Steer's order and *Steer was not bound thereby unless he ratified the purchase and claimed the benefit of the transaction*, in which event he must take the stock *as he finds it, i. e.*, subject to the conditions of the purchase as actually made, *i. e.*, subject to Logan & Bryan's advances to Mason & Owen.

(c) That the Steer purchase increased the burden of the Logan & Bryan loan against the stocks of the *other* customers of Mason & Owen which were held by Logan & Bryan, and that Steer cannot now reclaim his stock without assuming this increased burden for which he, through his own agents, Mason & Owen, was responsible.

(d) Even if it should be held that Steer is not to be held responsible for this increased burden of \$4,-775.00 placed by his agents upon the stocks of other customers, he should at least be required to contribute his pro rata share of the \$300,000 indebtedness and not be permitted to shift his proportion of the losses caused by Mason & Owen to the shoulders of Mason & Owen's other customers. His losses under this last mentioned theory would be such proportion of \$300,000 as the value of his stock bore to the value of all the stock in the pledge, or \$3,600.00 for which he could file his claim against the estate and receive dividends thereon the same as the other creditors.

## I.

**STEER IS ESTOPPED TO DISPUTE THE LIEN  
AGAINST HIS STOCK.**

Steer permitted, without objection of any kind, this stock to be taken in the name of a third person and to remain in the possession of a third party and clothed such party with all the *indicia* of ownership. By means of this apparent ownership, loans were charged against the stock, and such loans were not only charged against this particular 100 shares of Midvale, but the *increase* of debt to Logan & Bryan, which was made possible by the presence of the 100 shares of Midvale in the Logan & Bryan pledge, became a charge against all the *other* stock which was in the pledge.

In other words, the 100 shares of Midvale was solely responsible, for the *increase* of the indebtedness to the extent of \$4,775.00.

The question then is, who is to be held responsible for this *increased* indebtedness? Some one must suffer for the act of Mason & Owen in placing this additional charge of \$4,775.00 upon the stocks held in the Logan & Bryan pledge.

If Steer, on the one hand, and the other customers of Mason & Owen, on the other, are equally innocent of creating this additional charge, then we invoke the principle laid down in the syllabus to *Nat'l. etc. vs. Hibbs*, 229 U. S., 391, which reads:

“Where one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it.”

Steer is the person whose act enabled Mason & Owen to create this added charge of \$4,775.00 and he should

take his stock subject to the indebtedness incurred in its purchase. The charge was incurred *solely for Steer's benefit* and upon what principle can he demand that the *other* customers of Mason & Owen shall pay Logan & Bryan for his stock?

"The owner of personal property may by clothing another with an apparent title to, or authority over it, estop himself to deny such title or authority."

21 C. J., 1176.

In *Penn. Ry. Appeal*, 86 Penn., 80 (84), Judge Sharswood said: "Where one of the two parties who are equally innocent of actual fraud must lose, it is the suggestion of common sense, as well as equity, that the one whose misplaced confidence in an agent or attorney has been the cause of the loss shall not throw it on the other."

The above remark by Judge Sharswood was made in a case where stock, duly endorsed, had been intrusted to an agent who wrongfully used it for his own purposes.

Steer permitted this stock to remain in the hands of Logan & Bryan without demanding possession from any one.

If an owner allows his broker who purchases stock for him to hold the certificates in such manner that they will pass by delivery on the endorsement of the broker, he is estopped to claim title as against one who dealt with the broker in reliance upon the broker's apparent title.

*Thompson vs. Toland*, 48 Cal., 99.

In the syllabus to *MacDermott vs. Hayes*, 175 Cal., 95 (110-11), it is said:



“One who places his money in the possession and control of another, who thereupon uses it in the purchase of corporate bonds with a stock bonus, and thus becomes enabled to take the stock in his own name \* \* \* is estopped to claim title to the stock as against a purchaser for value and in good faith.”

Jones on Collateral Securities, Sec. 466 (p. 552) and cases cited.

Steer's case falls clearly within the principles of the above decisions. He permitted his stock to remain in third parties' name and possession for eight months, clothing them with the *indicia* of ownership. It was *his* act that made the loss of \$4,775.00 possible and he should bear the burden.

The foregoing decisions hold that if a party endorses stock to an agent who wrongfully pledges it, the owner must pay the loan. *A fortiori* should Steer stand the loan against his stock because he not only is responsible for having his stock pledged for Mason & Owen's indebtedness, but that indebtedness was created in part for Steer's benefit in the *actual acquisition of his interest in the stock*.

We deny that there is any principle of equity which requires third parties, such as the other customers of Mason & Owen, to submit to a sale of *their* stock to pay off the indebtedness created by the act of Steer in allowing Mason & Owen to borrow money on his stock.

In *Hirsch vs. Norton*, 17 N. E., 612 (Ind.), a person transferred stock to another who borrowed money on it; it was agreed between the parties that the assignor should remain the owner and receive the dividends, yet the assignor was held liable for the loan.

In *Russell vs. Telephone Co.*, 62 N. E., 751 (Mass.),



the owner of stock endorsed it and entrusted it to an agent who pledged it and the owner was held estopped to deny the lien of the pledge. This was the same principle in *Nat'l. etc. vs. Hibbs*, 229 U. S., 391, *supra*.

## II.

### STEER IS A MARGINAL TRADER BECAUSE THE PURCHASE WHICH HE RATIFIED WAS A MARGINAL PURCHASE.

Steer's authority to Mason & Owen was to purchase 100 shares of Midvale for him *for cash*. Mason & Owen did not execute *that* order but purchased a similar amount of stock as a marginal purchase *for themselves*. A marginal purchase differs in so many respects from and outright purchase that it was not an execution of Steer's order at all, and Steer was not bound thereby and could, if he so desired, have revoked his order to purchase and demanded the return of his money.

Steer could have recovered from Mason & Owen the money he paid them *at any time before Mason & Owen filled his order* and actually received the stock under their control.

*Re Brown & Co.*, 189 Fed., 440;

*Re Wettengel*, 238 Fed., 798, (C. C. A., 3rd) (See page 800).

*Mason & Owen never obtained possession or control of the Midvale stock*. Logan & Bryan always had the full and unassailable possessory right thereto under the contract of pledge, and *the circumstances never arose under which Mason & Owen had the right to appropriate Steer's money to any purpose*, and Steer could have reclaimed it if held intact; if not held intact the case

would be one of embezzlement, but the other customers of Mason & Owen cannot be held responsible to Steer for money embezzled by his, Steer's, own agents.

It is well settled that a pledgee can demand payment of the *entire* indebtedness secured by the pledge before releasing *any* of the pledged securities in his possession.

Jones on Coll. Securities, p. 64;

*Goepfer & Co. vs. Phoenix Brewing Co.*, 74 S. W., 726 (Ky.);

*Actna Ins. Co. vs. Bank of Wilcox*, 67 N. W., 449, (Neb.), 31 Cyc., 853-4.

As long as Logan & Bryan had the possessory right to the Midvale stock Mason & Owen had not complied with the condition which would authorize them to appropriate Steer's money, and until they had that right Steer could have demanded the return of his money.

Therefore, one of two things must be true,—either that Steer's money remains intact among the Mason & Owen assets, or that Mason & Owen misappropriated the money. In either event Steer is debarred from calling on the owners of the securities found in the Logan & Bryan pledge to refund to him the money that he entrusted to the agents selected by him to handle his affairs.

Of course, if Steer did, as we claim, *ratify* the marginal purchase, then another principle supervenes, viz., adoption of the agents' contract, which is hereinafter discussed.

If Mason & Owen had executed Steer's order as given by Steer, he (Steer) could have secured immediate possession of his stock. Such right of possession was a very valuable right.

The purchase of the stock as *actually* made did not give or preserve the right to possession of the stock except upon condition that the purchaser should pay to Logan & Bryan the indebtedness due from Mason & Owen to Logan & Bryan, for which indebtedness Steer's stock, as well as the stocks of other customers of Mason & Owen, was pledged.

When Steer ascertained the manner in which his order had been executed and learned that the execution had departed from his instructions so materially that he was not bound to take the stock, he was faced with the question whether to refuse to be bound by his agent's *unauthorized* execution of the authority given them, or to *ratify the purchase as made*, accepting the burdens as well as the benefits of the transaction.

He decided to claim the benefits of the purchase and not to seek the return of his money. He had a right to do that, however, but only by accepting the *burdens* as well as the *benefits* of the transaction.

In 9 Ency. of U. S. Decisions, page 701, the rule is laid down that a ratification of an agent's act is equivalent to an original authority *and must cover all the details of the transaction*.

In *Wahl vs. Tracy*, 121 N. W., 660 (662) (Wis.), the Court discusses the distinction between the execution of an order to purchase stock *outright* and a purchase of stock as a *marginal transaction*, and holds that a purchase of stock made in the manner followed in the case at bar *was not an execution of an order to buy stock outright* and that the customer (in the absence of a ratification of the purchase) was not obliged to take the stock purchased but could demand the return of his

money,—the theory being that a purchase on margin which left the stock subject to the perils and burdens of a broker's debts *was not an execution of the authority to buy for cash.*

In *White Plains Coal Co. vs. Teague*, 173 S. W., 360 (Ky.), we find the following syllabus:

“A principal authorizing its agent to buy mining rights for cash, and who accepted and held rights purchased by the agent on credit, thereby ratified the agent's acts and was bound to pay for the property, since it could [not] adopt only so much of the agent's acts as were beneficial.” (Insert is ours.)

When Steer ratified the Mason & Owen purchase by claiming the stock he took it as he found it subject to a lien for its purchase price and in pledge with a mass of other securities for an indebtedness of about \$300,000.00. Logan & Bryan advanced to Mason & Owen the monies with which the 100 shares of Midvale were purchased, to-wit: \$4,775.00, thus increasing the loan charged against the mass of pledged securities and thus placing an additional burden on the assets to which the creditors of Mason & Owen could look and we claim that Steer, and not the other customers, should pay the \$4,775.00.

### III.

#### **STEER'S STOCK SHOULD BE HELD LIABLE TO THE EXTENT THAT ITS PURCHASE INCREASED THE LOGAN & BRYAN LOAN.**

Steer's claim is that, notwithstanding the fact that the purchase of his stock in the market by Logan & Bryan increased the indebtedness against the securities of the other customers, he should receive *his* stock freed of the



lien of \$300,000.00 and that the purchase price of his stock, viz., \$4,775.00, *should be charged against the stocks belonging to the other customers of Mason & Owen*, thus increasing the burden on those other stocks for his benefit.

We say that having elected to *ratify* the marginal purchase of the 100 shares of Midvale he must take the stock as he finds it, *i. e.*, subject to the lien of the pledge, particularly as the indebtedness against the pledged securities was actually increased by the purchase of the 100 shares of Midvale.

That is to say: Steer now asks to withdraw the stock but to leave the indebtedness *caused by its purchase*, in other words, wishes to claim the benefits and *reject the burdens* of the contract of purchase. Only *one* purchase of Midvale stock was made (a marginal purchase) and that was the *only* purchase that could be ratified or adopted.

Steer claims the right to treat the purchase as having been made for cash and the stock delivered to Mason & Owen fully paid for and clear of liens. The trouble with that contention is that no purchase of *that* character was made, and he had no opportunity of ratifying *that* kind of a purchase. He had the election to demand the return of his money or to ratify a *marginal* purchase; he chose the latter and must take the stock as he finds it.

Any other disposition of Steer's claim would permit him to add \$4,775.00 to the burden on the other customer's stocks and then to require such *other* stocks to discharge the increased indebtedness incurred for *his* benefit.



### A HYPOTHETICAL CASE.

The situation may be simplified as follows: Instead of there being a large number of creditors involved let us suppose there were but two, A and B.

A buys \$10,000 worth of stock through Mason & Owen, the order being executed by Logan & Bryan, he paying \$4,000 to Mason & Owen which is duly remitted to Logan & Bryan who keep possession of A's stock as security for the unpaid balance of \$6,000, A's equity being \$4,000.00.

B then orders \$4,000 worth of stock and pays Mason & Owen in full therefor. Mason & Owen purchase B's stock on margin through Logan & Bryan who advance the \$4,000 as a loan to Mason & Owen and hold both A's and B's stock as security for the entire indebtedness of \$10,000. Suppose that B's agents, Mason & Owen misappropriate B's \$4,000 and then go into bankruptcy.

A and B then seek to reclaim their stocks from Logan & Bryan. A is willing to pay the balance of the purchase price of his stock, \$6,000, and receive his stock, but B insists, because he has paid for his stock in full to his agents who failed to apply it to the purchase of his stock as they should have done, that Logan & Bryan should collect the \$10,000 due them by selling A's stock for \$10,000, paying off their lien in full, and handing B's stock to him as fully paid for, thus wiping out A's equity of \$4,000 to make good the loss caused to B by the malfeasance of his own agents.

Upon what principle of law can it be held that A's equity of \$4,000 in his stock should be appropriated to make good the losses sustained by B on account of the wrongful acts of *his own chosen agents*? The learned

counsel for appellee has never satisfactorily answered the above question and we maintain that that question is involved in this case and that an answer thereto cannot be avoided.

The trial court held in one of his interlocutory opinions that Steer did not have the right to reclaim the Midvale stock because he failed to trace his money into the stock, and also decided that Steer could not recover the stock until he had paid the full amount for which the stock had been pledged to Logan & Bryan, and followed the ruling of this court in *Spokane County vs. First National Bank of Spokane*, 68 Fed., 979 (1902), which holds that ownership on the trust fund theory depends upon proof that the claimant's money can be *traced into the property claimed*, and he further held that Steer had *failed to trace his money into the Midvale stock*.

**THERE IS NO PROOF THAT STEER'S MONEY WAS  
INVESTED IN THE STOCK.**

After having decided at first that Steer had failed to trace his money into the Midvale stock the trial court re-considered his conclusion on that point and decided that a presumption existed that the money had been so invested, saying,

“In the absence of evidence it is to be presumed, of course, that Mason & Owen did the thing required of them, that is, paid this amount of money on account of the purchase price of the Steer stock” etc. (See Judge Bledsoe's opinion, Record, p. 14).

In making the above finding we contend that the learned judge below overlooked the evidence in the case.

The evidence on that point was as follows:

Inquiry was made of Logan & Bryan as to how the Midvale stock was purchased and whether any monies were ever applied to the purchase price thereof. This inquiry was made by a letter from the trustee of the bankrupts to Logan & Bryan, their reply thereto, and two telegrams between the same parties, and it was stipulated by the parties hereto that said letters and telegrams should be received as evidence of the matters therein stated. (Record, 12.)

The letter from Logan & Bryan (per L. V. Sterling) contains the following:

“Mason & Owen sent us an order on March 20th, 1920, by telegram, to purchase 100 shares of Midvale stock for them. We immediately executed the order on the New York Stock Exchange by purchasing 100 shares of Midvale for Mason & Owen at \$47.75 per share, and immediately notified Mason & Owen, by wire, that we had done so. We advanced for Mason & Owen \$4,775, the purchase price of said shares, which money we advanced as a loan to Mason & Owen and charged it to their account, together with \$15, commission for making such purchase. The net result of the transaction was that the general loan indebtedness then owing by Mason & Owen to us was increased by \$4,775, the amount of the purchase price of the 100 shares of Midvale stock, plus our commission, making a total of \$4,790.

“At the time we purchased the Midvale stock above referred to, we had no knowledge, and never since then had any knowledge of any kind, that the stock was being purchased for anyone but Mason & Owen.

“Whatever moneys we received from time to time from Mason & Owen, on account of stocks purchased by us for them, were credited to the general account of Mason & Owen with us, that is, were credited on the indebtedness which Mason & Owen owed us.”

The telegram from Logan & Bryan was as follows:

“Mason & Owen did not request us to apply any money to purchase price of Midvale stock.

“All remittances were applied on their general debit balance.

(Signed) LOGAN & BRYAN.”

In addition to the above letter and telegram the parties hereto stipulated that Logan & Bryan held the Midvale stock “as security for the payment of all sums Mason & Owen might owe Logan & Bryan upon said date (March 20, 1920) or subsequent to that time”, (Record, 3-4), the stipulation further stating that the Midvale stock was pledged to Logan & Bryan to secure Mason & Owen's indebtedness which subsequently amounted to approximately \$300,000, (Record, 5).

The above quotations from the record constitute all the evidence there is as to the tracing of Steer's money into the Midvale stock. There is not the slightest evidence to show that any of Steer's money was ever sent to Logan & Bryan. Neither is there any evidence that Mason & Owen ever attempted to apply any money from *any* source to the payment of the Midvale purchase price. In fact the telegram from Logan & Bryan above quoted shows *affirmatively* that *no such request was ever made by Mason & Owen.*

We therefore contend with the utmost confidence that Steer has *wholly failed to trace his money into the stock in question* and has wholly failed to bring himself within the doctrine of *Spokane County vs. First National Bank of Spokane*, 68 Fed., 979 (982).



## THE TRIAL COURT ERRED IN HOLDING THAT THE MIDVALE STOCK WAS NOT HYPOTHECATED.

The trial court also apparently held that there was no hypothecation of the Midvale stock because there was "no showing of any hypothecation of this particular stock for any *particular* sum." (Record, 15). The above references to the record show that the Midvale stock was pledged for \$300,000 along with the stocks of other customers of the value of \$400,000 (Record, 5).

The record also shows that said \$300,000 was paid out of the sale of said *other* stocks, (Record, 6), thereby releasing the Midvale stock, and Steer claims that the monies realized from the sale of the stocks of the other customers should be used to release his stock and that the *other* customers should bear *all* the losses caused by the bankruptcy of Steer's brokers, notwithstanding the fact that the purchase of the Midvale stock was responsible for increasing the burden of the Logan & Bryan loan by \$4,775.00.

## THE RIGHTS OF MARGIN TRADERS ARE NOT INFERIOR TO STEER'S RIGHTS.

It appears from the record (page 7) that the securities held in pledge by Logan & Bryan consisted partly of stocks owned by so-called margin traders and partly of stocks whose owners had paid their full purchase price to Mason & Owen, Steer's stock being of the latter class, and Steer claims that he had the right to require Logan & Bryan to collect their loans out of the margin stock before having recourse to the Midvale stock.

Our first answer to said contention is that the Midvale stock was purchased by Mason & Owen as a *mar-*



ginal purchase, no money at all having been paid thereon, (see Logan & Bryan letter and telegram, *supra*) and was *strictly margin* stock the same as the other stocks held under the Logan & Bryan pledge.

The second answer is that there is no distinction between margin stock and so-called "fully paid" stock because the title to margin stock is in the purchasers thereof, subject only to a lien against same for the unpaid purchase money.

*Richardson vs. Shaw*, 209 U. S., 365 (380).

In the Wilson case (252 Fed., 631) the court said:

"Lastly, in this connection, it is urged that margin customers are on a different basis from those who have paid for their securities outright. *There is no logical ground for this distinction.* The margin customer is the owner of the securities which the broker is carrying for him, and they become his absolutely the moment he pays any amount outstanding against him. The broker, it is true, may not hypothecate the securities of the outright owner, and may hypothecate those of the margin customer." (Page 649.) (Our italics.)

The court in the Wilson case did not hold that a broker could hypothecate margin stock without the consent of the owner. What was said on that point in the above excerpt must be read in connection with the facts in that case which were that the margin traders there involved had *consented to the pledge of their stock*. (See copy of re-pledge agreement on page 643 of opinion.)

In fact, it is a criminal offense in New York for a broker to re-pledge margin stock for more than the unpaid purchase price unless the owner authorizes the broker in writing so to do. (See copy of criminal statute at bottom of page 643 of the opinion in the Wilson case.)

**THE FACT THAT A STOCK SURVIVED THE  
PLEDGEE'S SALE DOES NOT CREATE SPECIAL  
RIGHTS.**

It may be contended that the fact that the Midvale stock fortuitously survived the sale by Logan & Bryan of portions of the pledged stock gives it special rights. The decisions are against that contention.

*Re Wilson*, 252 Fed., 631 (639-40);

*Whitlock vs. Seaboard Bank*, 60 N. Y. Supp., 611 (613).

**THE LOGAN & BRYAN DEBT WAS A COMMON  
PERIL.**

The owners of all the securities in the pledge were faced with a common danger, viz., an enforceable debt of \$300,000. All were interested alike in getting rid of the peril. Some stocks had to be sacrificed to save the rest, just as some goods are thrown from a ship in a storm in order to save the balance of the cargo, but the salvaged part has to stand its share of the loss. This same equitable rule applies to the Steer stock which was saved by the sacrifice of the other stocks and clearly Steer should contribute his part of the loss and the other owners are subrogated to the rights of Logan & Bryan against Steer's stock. It was so held by Judge Bledsoe in one of his opinions. He filed three opinions, each one apparently differing from the others. We have filed with the papers in the case certified copies of the first two opinions which Your Honors may desire to refer to.

**APPELLEE'S CONTENTION.**

The appellee's contention in the lower court was that he should recover because, (a) there was no other cus-

tomers claiming any Midvale stock, and (b) because he had given to his agents, Mason & Owen, the necessary money to enable them to purchase and pay for the stock. He contends that he should not be held responsible for the malfeasance of his agents in failing to purchase, pay for and acquire possession of the stock ordered by him, but contends that such loss should be charged against the *other customers of Mason & Owen* because they were margin traders.

We trust that the argument heretofore made in this brief answers the above contentions and all that remains now is to consider briefly the authorities cited by appellee in the court below.

#### **ANALYSIS OF APPELLEE'S AUTHORITIES.**

We do not know whether appellee will cite the same decisions here that he relied upon below so will not lengthen this brief, already longer than intended, by commenting thereon, but have set forth a careful analysis of said authorities in an Addenda to this brief, to which attention is respectfully asked in the event such decisions are cited in appellee's brief.

#### **TESTIMONY OF MASON.**

Portions of Mason's testimony were printed in the Record at appellee's request. (Record, 17-21). The testimony seems to be immaterial and we will not refer to same except to raise the objection made in the court below (Record, 20-21), that same was hearsay and incompetent. What Mason may have said, in court or out of court, regarding Steer's stock was undoubted hearsay. Neither are his statements admissible as admis-

sions because his admissions made *after* his estate passed to the trustee in bankruptcy cannot bind the trustee. It may be added that Steer, not being a creditor of the bankrupts, was not a party to the creditors' meeting before the Referee and the testimony of Mason could not have been used against *him* and therefore cannot be used *for* him.

Nor was his testimony signed by him as required by General Order in Bankruptcy XXII.

### NET RESULT OF THE DECISION OF THE LOWER COURT.

In conclusion we wish to point out that the real meaning of the decision of the lower court is that Steer is not to be held responsible for the acts of *his own chosen agents*, but can shift that responsibility to the shoulders of third parties who had nothing whatever to do with the selection of Steer's agents, and who had nothing whatever to do with the malfeasance of said agents, and we are bold enough to inquire, in the event Steer can shift his losses onto the shoulders of the other customers of Mason & Owen, whether such other customers cannot shift *their* losses onto Steer's shoulders. *Surely the rule ought to work both ways.*

We ask that the judgment of the lower court be reversed with directions to require Steer to pay to the trustee \$4,775.00 as a condition of the delivery of the stock and that his reclamation petition be dismissed on the merits unless such payment be made within a time to be fixed by the court.

Respectfully submitted,

WILL J. THAYER,

*Appellant's Attorney,*

462 Spreckels Bldg., San Diego, Cal.



## ADDENDA.

ANALYSIS OF AUTHORITIES CITED BY APPELLEE  
IN THE LOWER COURT.

*Re McIntyre & Co.*, 181 Fed., 955 (Pippey's case). Pippey's transactions with McIntyre & Co. (the brokers) were closed on April 9, 1908, leaving McIntyre holding 18 shares of Pullman for Pippey. McIntyre wrongfully hypothecated these shares on April 23, 1908, and failed on April 24, 1908. The court held that the pledge of Pippey's stock was "a larceny of the stock", (p. 958). The *identical* certificate given by Pippey to McIntyre & Co. was found in the pledgee's possession free and clear of any lien and the court held that Pippey was entitled to the property *stolen* from him. The court said certain other decisions do not control "when property stolen from its real owner is found unsold in the possession of the thief" (p. 959). This was on the principle that stolen property may be recaptured wherever found.

*Gorman vs. Littlefield*, 229 U. S., 19, has no bearing on the case at bar. In that case the claimant had ordered and paid for 250 shares of copper stock. The bankrupt broker bought the shares, as directed, together with 100 additional shares of the same copper stock. The 350 shares were duly delivered to the broker subject to Gorman's order and were found *in the broker's possession* at the time of his failure (p. 22). *The stocks had not been pledged for the broker's debts* (as in the Steer case) and the court held that the trustee should deliver to Gorman his 250 shares which is quite different from taking the shares from a *bona fide* pledgee.



In *Thomas vs. Taggart*, 209 U. S., 385, 83 shares of steel stock had been left with the broker as security for losses, if any should occur. None occurred. The steel stock survived the sale by the bank to which it had been pledged.

It was not shown, as in the case at bar, that the stock had been purchased by the broker on margin with monies borrowed on the stocks of other customers, nor that the customer left his stock in the pledge for eight months, during which time the loan increased, *nor was it shown that the loan against the pledged stock was increased by the full purchase price of the reclaimed stock as was done in the Steer case.*

In *Richardson vs. Shaw*, 209 U. S. 365, it appeared that the claimants were margin traders. The court held that as such they were the *legal owners of the stocks* which the broker was carrying for them on margin; that being owners the relation of debtor and creditor did not exist between them and their broker, (the bankrupt) and that therefore, the broker had the right to continue to transact his business *in the ordinary way* until bankruptcy proceedings should be begun, and to deliver stocks to their owners, as usual, on payment of what the customer still owed, and the decision in the case was simply that *the court would not disturb the voluntary arrangement made between the broker and his customers.* That is as far as the decision went, and of course, does not apply to the case at bar where the broker refused to deliver the stock to his customer after demand therefor, he having lost control of it under a huge pledge. Steer in this case had made a futile demand for his stock. (Record, 5). We hope Your Honor will find time to

give the Richardson case a careful reading, as we believe it will bear our construction of it.

In *In re Bolling*, 147 Fed., 786, the question was whether, as between a margin trader and the *general creditors* of the bankrupt, the proceeds of certain stock which had been purchased for the margin trader should be paid to the owner of the stock, or be applied to *general creditors*. The contest regarding these proceeds was between the *general creditors*, on the one hand, and the owner of the stock which produced the fund, on the other hand, and the court *decided in favor of the margin trader*. We believe the decision was correct.

In *Royea's Estate*, 143 Fed., 182, the referee ordered \$120.00 to be paid to the claimant out of the funds found in the bankrupt's bank account. The question was whether the \$120 had been sufficiently traced and the court properly held that it had been. Also, the contest in the Royea case was between the claimant and the *general creditors*, as stated at the bottom of page 182 of the opinion, which is not the case here.

IN THE <sup>9</sup>

**United States**

**Circuit Court of Appeals**

**For the Ninth Circuit**

---

In the matter of C. F. MASON and WM. McD. OWEN,  
co-partners, trading as MASON & OWEN,  
Bankrupts

C. F. MASON and WM. McD. OWEN,  
Bankrupts

GEORGE P. KIER, Trustee  
Appellant

J. E. STEER,  
Appellee

---

**BRIEF OF APPELLEE**

---

Upon Appeal from the United States District Court, for  
the Southern District of California,  
Southern Division

---

GEORGE H. STONE,  
*Attorney for Appellee,*  
304 Southern Title Building,  
San Diego, California

**FILED**

APR 29 1922

F. D. MONCKTON,

CLERK



# GENERAL INDEX

Statement of Facts .....	Page 5
Argument .....	Page 6
As to Identification .....	Page 6
As to Rights to Stock.....	Page 7
In re Appellant's Claims.....	Page 12
As to Frivolous Appeal .....	Page 16

---

## INDEX TO CASES CITED

In re Bolling, 147 Fed., 786.....	Page 9
Duel vs. Hollins, 241 U. S., 523.....	Pages 7, 9, 10
Gorman vs. Littlefield, 229 U. S., 19.....	Pages 7, 8, 12
In re Graff, 117 Fed., 343 .....	Pages 12, 14
In re McIntyre, 181 Fed., 955.....	Pages 11, 13, 14
National vs. Hibbs, 229 U. S., 391.....	Page 14
Richardson vs. Shaw, 209 U. S., 365.....	Page 8
In re Royea, 143 Fed., 182.....	Page 7
Spokane County vs. First Nat'l Bank, 68 Fed., 979...	Page 7
Thomas vs. Taggart, 209 U. S., 385.....	Page 7
Wahl vs. Tracy, 121 N. W., 660.....	Page 13
Whitlock vs. Seaboard National Bank, 60 N. Y. Supp., 611 .....	Page 14
In re Wilson, 252 Fed., 631.....	Pages 7, 9, 14





IN  
**The United States Circuit  
Court of Appeals**  
**FOR THE NINTH CIRCUIT**

---

In the Matter of C. F. MASON and WM. McD.  
OWEN, co-partners, trading as MASON &  
OWEN,

Bankrupts,

C. F. MASON and WM. McD. OWEN,

Bankrupts,

GEORGE P. KIER, Trustee,

Appellant,

vs.

J. E. STEER,

Appellee.

---

**Brief of Appellee**

---

**FURTHER STATEMENT OF FACTS.**

In addition to the facts set out by appellant we would add:

Steer purchased the 100 shares of Midvale from Mason & Owen on March 20th, 1920, and on that date paid them in full.

On November 20, 1920, prior to the filing of petition in bankruptcy, Steer demanded his stock from Mason & Owen and on November 24th, 1920, demanded it from Logan & Bryan who had held the stock from date of purchase (Record, page 4). All dividends on said stock were paid to Steer by Mason & Owen prior to bankruptcy but the dividend of Fifty Dollars received Jan. 1,

1921, after bankruptcy has not yet been paid to Steer (Record, page 5).

Petition in Bankruptcy was filed December 6th, 1920. Subsequently all stocks purchased from Mason & Owen on margin were sold by Logan & Bryan under order of court to satisfy the indebtedness of Mason & Owen to Logan & Bryan, the proceeds of said sale of marginal stock more than paid all of the Mason & Owen indebtedness to Logan & Bryan and the marginal stocks were the only ones sold by Logan & Bryan to liquidate their claim. (Record, page 7b). Twenty-one securities, including the 100 shares of Midvale, all fully paid for to Mason & Owen and with no trade pending thereon, were not sold but survived the liquidation. (Record, page 7b).

The 100 shares of Midvale at the time of Bankruptcy was the only Midvale stock held by Mason & Owen or Logan & Bryan for Mason & Owen, and no one other than Steer was "long" on Midvale on the books of Mason & Owen. No claim has been filed against Mason & Owen for Midvale Stock by any one other than Steer (Record, page 6).

All stocks in the hands of Logan & Bryan prior to the bankruptcy were held by them as pledged to secure the indebtedness of Mason & Owen to them. Among these they held this 100 shares of Midvale, so pledged, but without authority or consent from Steer and without his knowledge (Record, pages 3 and 4).

#### ARGUMENT.

This 100 shares of Midvale stock *is sufficiently identified*, since at the time of bankruptcy there was in the hands of Logan & Bryan to the credit of Mason & Owen

an equal amount of the same kind of stock and no one else claiming it.

*Gorman vs. Littlefield*, 229 U. S., 19, at 24-25;

*Duel vs. Hollins*, 241 U. S., 523, Syl.;

*In re Wilson*, 252 Fed., 636, at 651.

This is true no matter whether the stock is in the hands of a pledgee, Logan & Bryan, or in the "box" of Mason & Owen.

*In re Wilson*, 252 Fed., 639 at 654.

The same conclusion is reached in appellant's case, *Spokane County vs. First National Bank of Spokane*, 68 Fed., 979 at 983.

Bankruptcy courts have even gone so far as to hold "that where petitioner entrusted certain money to the bankrupt for safe keeping only, and he deposited it to the credit of his general bank account, which at all times exceeded the amount so intrusted to him and come into the hands of his trustees in bankruptcy, plaintiff was entitled to enforce a preferred claim on such bank balance in the hands of the trustee, tho the actual money delivered to the bankrupt could not be identified".

*In re Royea*, 143 Fed., 182, Syl.

The whole line of bankruptcy cases without exception from the oldest to the very most recent cases holds that "securities held by stock brokers as collateral to their customers' accounts may, where the latter are not indebted to the brokers, be recovered by such customers from the trustee in bankruptcy of the broker's estate."

*Thomas vs. Taggart*, 209 U. S., 385, Syl. 3.

The bankrupts can not avoid this result by claiming that they converted this particular stock, for the bankrupts are presumed to hold 100 shares of Midvale at all

times for claimant Steer and "no creditor could justly demand that the (*bankrupts'*) estate be augmented by a wrongful conversion of property of another in this manner or the application to the general estate of property which never rightfully belonged to the bankrupt."

*Gorman vs. Littlefield*, 229 U. S., 19, at 25.

In said *Gorman vs. Littlefield*, *supra*, the stock was bought on the order of the customer, fully paid for, left in the broker's possession, found in the hands of the trustees of the bankrupt broker, and was ordered by the court to be delivered to the customer, exactly the case at bar except that there was no intervening pledge to be considered.

But even tho pledged wrongfully or rightfully the stock *when paid for in full is the property of the purchaser*, and he is entitled to its possession. Courts have held that where a customer who had been trading with a broker but had certain stock fully paid for with no trade pending, demanded delivery of those stocks from the broker who was then insolvent and had pledged the stock to secure a loan; that when the broker redeemed that stock and delivered it to his customer it was not a preference and the customer was entitled to the stock.

*Richardson vs. Shaw*, 209 U. S., 365.

If the customer was entitled to the stock in the course of business, when insolvent, prior to bankruptcy, then logically all customers who have paid for their stock in full could demand the delivery of it, the insolvent broker would be required to redeem it and deliver to the customer, which would leave the marginal stocks in the hands of the broker with which to pay off the pledged indebtedness.



And this logic is supported by the decisions of the court authorizing that same transaction even after bankruptcy. Thus "a stockbroker who purchases and carries stocks on account of a customer on margins furnished by such customer, holds the same as a pledgee and on his bankruptcy the customer is entitled to the stock on payment of the amount due thereon, or to the surplus realized from its sale by the trustee, to the exclusion of the bankrupt's creditors," (namely marginal traders).

*In re Bolling*, 147 Fed., 786 Syl.;

*Duel vs. Hollins*, 241 U. S., 523 at 527.

In our case at bar none of the marginal traders did so pay for their stock (Record, page 7b). All of their stocks were sold in order to liquidate the indebtedness to the pledgee and the marginal stocks more than paid that debt: but if those marginal traders had wished to save themselves any loss they could have paid up the amount due on their purchase, demanded their stock and thus placed themselves in a preferred class the same as those who had paid for their stock in full before the bankruptcy. Thus those who had paid for their stock in full before bankruptcy as well as who had paid up afterwards in order to secure the stock, would be in the same preferred class and if the marginal stock did not pay the pledged indebtedness in full, these preferred holders must share pro rata such deficiencies in the amount of the pledged indebtedness as was not covered by the pure marginal stock.

This position is fully set forth *In re Wilson*, 252 Fed., 635-6, Rolph's claim. There the Class "A" creditors were those whose stock was fully paid for, and Class

"B" the pure marginal traders, exactly the position in the case at bar but with this difference; that in our instant case there is no deficiency to be shared by the preferred or Class "A" claimants. All the pledgee's debt was paid out of the marginal stock so there is no debt to be shared by the Midvale Steel and the other twenty paid-in-full stocks which survived the liquidation by the pledgee, while in the Rolph claim (Wilson case) there was not sufficient of the marginal stock when sold, to pay the pledge so that the Class "A" or preferred claimants had to share the deficiency and Rolph received his stock but had to pay in the value of his stock and share in the Class "A" claims in proportion to the amount he paid in and that the Class "B" lost their whole margin on which they were gambling for a rise in market, Class "A" sharing only what debt to pledgee was not paid by Class "B".

This same point was raised and similarly settled *In re Hollins*, 241 U. S., 523, where the court held that Duel and Weiners, marginal traders, who offered to pay up the balance due on their stock were entitled to do so and to claim the stock or their just proportion of that kind of stock which the bankrupt had on hand and that other marginal traders could do likewise, and that when they did so, they were preferred as to those stocks which they claimed and which were on hand, or to their proportion thereof if there was not sufficient for all paid-in-full claimants. And in that case too the stock was bought by the broker, issued in the name of the broker or the correspondent and not particularly assigned to the claimant exactly as in our case at bar.

Thus it is squarely held that where stock certificates

were delivered to a broker, as security for trades, but without authority to pledge and where there were no trade pending, but contrary thereto the stock was pledged by the broker; when the loan was liquidated and it was found unnecessary to sell the stock in order to satisfy the debt for which it was pledged, the customer could recover.

*In re McIntyre*, 181 Fed., 955, Pippy's claim at 958.

That being the rule where creditors delivered specific stock to the broker to handle as collateral, logic would hold the same rule in case the broker bought stock for the customer and it were sufficiently identified as is Steer's. The courts have so held in a case very similar to our claim of Steer, where the broker purchased stock through another firm, fully paid for by the customer, and the firm so purchasing retained the stock and later sold it to pay an indebtedness of the bankrupt broker to them, leaving a balance of cash in their hands. The court held that the claimant's money was in this balance, that as against the bankrupt and his general creditors whose rights were no greater, the presumption was that the proceeds of the customer's stock went into the same balance and he was entitled to recover the same; that the broker had no right to authorize his correspondent to sell this customer's paid-in-full stock in priority to his own (the broker's) stock, namely that purchased by him for his marginal customers. In our Steer claim as in the case under discussion no other customer of the broker was "long" on the stock claimed at the time of the failure except customers who paid a debit balance to the firm against the stock bought for them and thereby placed themselves in a preferred position as to those

stocks. The court ordered the proceeds of the sale of the Maxwell stock returned to him.

*In re Graff*, 117 Fed., 343, claim of Maxwell.

Judge Bledsoe in his opinion of March 14th in this case stated the correct rule, we believe, namely: that anyone "who bought on margin through Mason & Owen would not be entitled to have their losses shared in or contributed to by those who, like Steer, paid for their stock in its entirety." Subsequent to such decision the testimony of Will J. Thayer at that time trustee but now attorney for a new trustee, covering that point was received by the court and is summarized in the stipulation for record on appeal (Record, page 7b), showing that the whole loss could be and was absorbed by the marginal stocks.

### IN RE APPELLANT'S CLAIMS

But notwithstanding this unbroken and conclusive line of bankruptcy cases, appellant claims that Steer ordered a purchase of stock for cash but that Mason & Owen made the purchase on margin hence Steer must either repudiate his contract and demand his money back, i. e., become a general creditor and take his loss with the marginal traders, or he must ratify and take his stock subject to the lien of Logan & Bryan and in that case also share the loss the same as the marginal traders. This cannot be justice nor is it the law, for Mason & Owen are presumed to have remitted the money paid by Steer, to their correspondent and to have kept 100 shares of Midvale stock on hand at all times for the customer.

*Gorman vs. Littlefield*, 229 U. S., 19 at 25.

Appellant also claims that the purchase of this stock



increased the indebtedness of the pledgee against all of the stock held by them but overlooks the fact that the Steer transaction not only increased the stock held as security but increased the cash on hand and unless Steer can now take out his stock or its purchase price the marginal traders will have benefited to the extent of the cash paid in by Steer in that transaction.

How then under general rules of equity could the marginal traders who have only partially paid for their stock and thereby made necessary, in the first place, the pledge, in order to carry their unpaid balance and who did not protect their account on bankruptcy by paying the amount due on their stock and thereby becoming preferred creditors—how should they in fairness and equity benefit in the transaction and take all or part of the stock from one who paid for his in full and the use of whose stock in the pledge, was a conversion at least, or probably a larceny.

*In re McIntyre, supra*, syl. 2;

*Wahl vs. Tracy*, 121 N. W., 660.

Counsel does *not* quote a *single* bankruptcy case contrary to our conclusion but relies on what he calls general principles, as in the case of *Wahl vs. Tracy*, 121 N. W., 660, *not a bankruptcy case* but one which discusses the relationship between a broker on an unexecuted order and the ordering creditor and decides rights of broker and purchaser, having no point as to relation of different classes of buyers and no bearing as to whether a paid-in-full stock claimant has a preference over one buying on margin and who is still indebted for his stock. Tho even in that case the court said that had the customers paid cash, the stock would have been his prop-



erty from the time of the purchase free from liability to the general creditors.

Again, no doubt the appellant's case of *National vs. Hibbs*, 229 U. S., 391, tho *not involving bankruptcy* or rights between customers, states a well recognized principle of equity; but when applied to cases of this kind the courts invariably have held that tho the stock owner did thereby expose himself to the risk of losing the stock which was pledged by the broker for broker's own debt, if the pledgee in good faith and for valuable consideration found it necessary to sell the stock in order to secure the payment of advances, on the doctrine of estoppel; but that the customer *did not by such transfer* part with his title to the stock in event the pledgee found it *unnecessary* to sell the stock in order to satisfy the debt for which it was pledged, and could recover the stock or if sold the proceeds thereof. Here the whole theory of estoppel claimed by appellant is considered and exploded as it relates to a bankruptcy case like ours.

*In re McIntyre*, 181 Fed., 955 at 958.

As appellant quotes, Mason & Owen owned outright all of the stocks purchased for marginal traders (until such purchasers paid for their stocks in full) but *did not own* and could not sell or rightfully pledge those paid for in full.

*In re Wilson*, 252 Fed., 631 at 649;

*In re Graff*, 117 Fed., 343 at 344.

Counsel also refers to *Whitlock vs. Seaboard National Bank*, 60 N. Y. Supp., 611, a decision by a state court *not in bankruptcy* which attempts to settle rights between co-sufferers. Here we have none between co-sufferers since the Steer stock and all others in the same

class which were paid-in-full survived the liquidation and have no loss to share. On the other hand all the marginal traders are in the same boat, all their stock has been sold and none of them paid up their debit balance and claimed their stock. In that case there is no question raised as to who are preferred, all were in the same class.

The evidence in the case at bar shows that all moneys received by Mason & Owen were forwarded to their correspondents Logan & Bryan and the presumption must be that the balance of Steer's money was forwarded and augmented the amount of cash to their credit with Logan & Bryan and as Judge Bledsoe in his decision of February 1st, 1922, said, "it is to be presumed of course that Mason & Owen did the thing required of them, that is, paid this amount of money on account of the purchase price of the Steer stock rather than that they had embezzled it, that is, used it for their own private speculation." (Record, page 14.)

There is no showing of the amount of indebtedness on March 20th, 1920, from Mason & Owen to Logan & Bryan nor the amount of the stocks pledged and in the hands of Logan & Bryan; there is no showing that there was any loss or insolvency at that time and there probably was none, and the sale of the stock then held by the pledgee would have paid out in full. It was only on the declining market of the Fall of 1920 that the fictitious named account in which the bankrupts purchased stock on their own account showed a loss.

The marginal traders paid Mason & Owen a 10% or other larger percentage on the purchase price of their stocks; the pledge of those stocks so purchased was nec-

essary in order to borrow the money to carry their unpaid balance. The bankrupts used the credit of these rightfully pledged stocks to speculate and just before bankruptcy their tradings showed an irretrievable loss. What dividends have been paid have to that extent reduced their percentage investment—but now their quondam Receiver—Trustee—attorney—appellant asks that Steer who paid 100% and needed no pledge or loan to carry his stock, should pay more and give it to further reduce the losses of the marginal traders who were gambling for a rise in market. We need no hypothetical case to show the equities of the parties.

We submit that under the facts and the law the 100 shares of Midvale stock is sufficiently identified; there is no one else claiming this stock, no one else bought this character of stock, it is on hand for us. We further submit that the cases we have cited fully cover the whole subject, are exclusively bankruptcy cases, are absolutely conclusive, all to one end, namely that Steer is entitled to his stock or if sold to its value.

#### **AS TO FRIVOLOUS APPEAL.**

We also submit that the argument of appellant is so apparently fallacious, intentionally false and misleading, the cases cited are not in bankruptcy, but are so palpably inapplicable and inconclusive and the premises so unfair, inequitable, and absolutely unsupported by the law, that this court must needs draw the same conclusion that we have come to during this continued litigation and which we now urge, namely; that this appeal is taken frivolously and for ulterior purposes of the trustee or his attorney, which we could name if not for our hesitancy to go outside of the record—purposes other than a right

ful determination of these issues which have been by the courts often and clearly determined in the same view as we are now asking that they be determined.

We submit that this appeal is an unjust burden on appellee, Steer, not only by keeping him out of the use of his stock but by putting him to great expense and litigation to procure his patently rightful property.

Finally we submit then that the order of Judge Bledsoe for the delivery to us of the stock and of the accrued dividends should be affirmed.

Respectfully submitted,

GEORGE H. STONE,

*Attorney for Appellee.*





United States  
Circuit Court of Appeals  
For the Ninth Circuit

---

IN THE MATTER OF C. F. MASON & WILLIAM McDEE OWEN, Co- partners as MASON & OWEN, Bankrupts. GEO. P. KIER, Trustee, Appellant, J. E. STEER, Appellee.	}
---	---

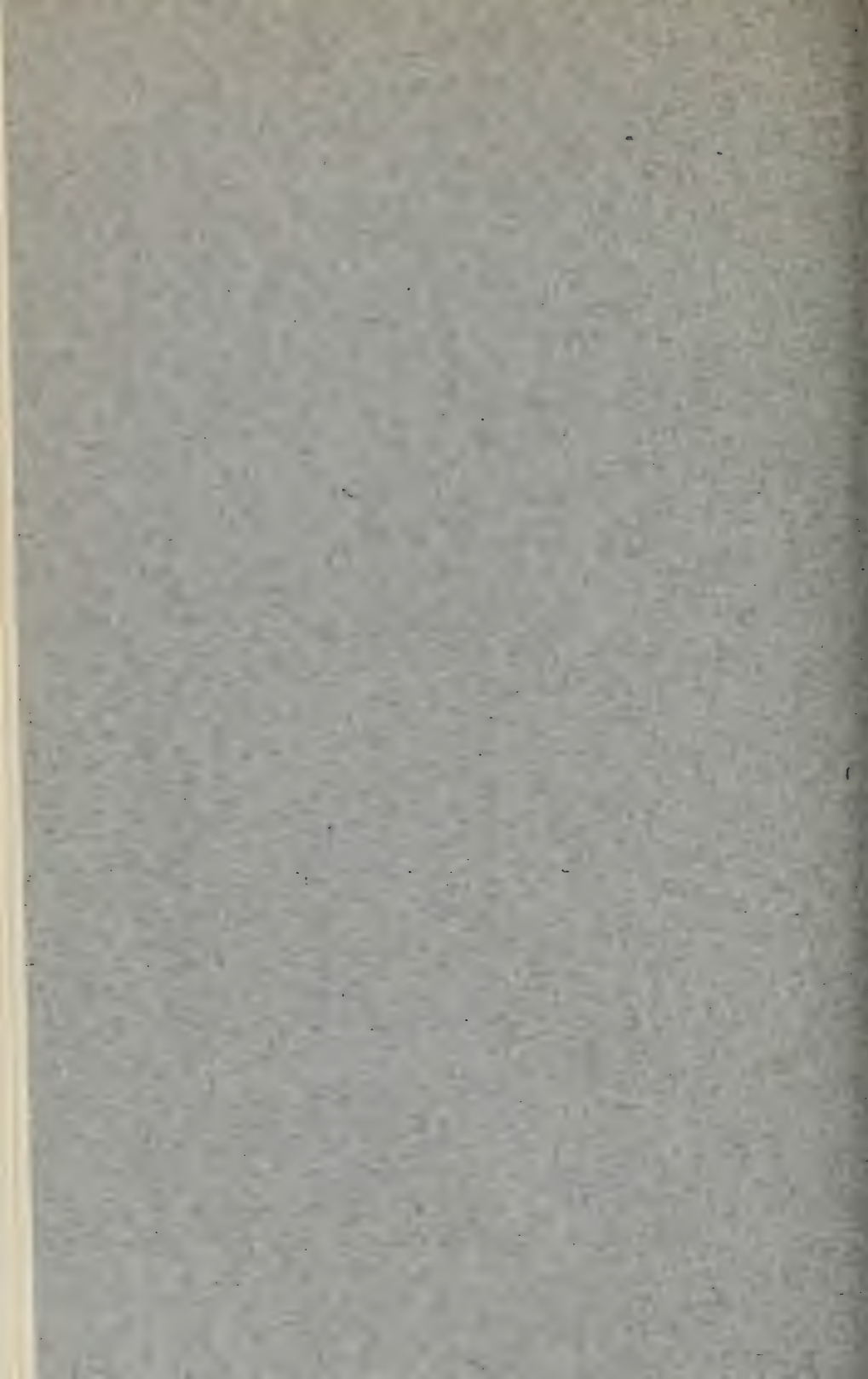
---

Petition for Re-Hearing

---

Upon Appeal from the United States District Court for  
the Southern District of California,  
Southern Division

---



IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

---

IN THE MATTER OF C. F. MASON &  
WILLIAM MCDEE OWEN, Co-  
partners as MASON & OWEN,  
Bankrupts.

GEO. P. KIER, Trustee,  
Appellant,

J. E. STEER,  
Appellee.

---

---

**Petition for Re-Hearing**

---

Upon Appeal from the United States District Court for  
the Southern District of California,  
Southern Division

---

*To the Honorable the Judges of  
the above named Court:*

The filing of a petition for re-hearing is an ungracious task as it gives the petitioner the appearance of being a critic of the court,—a role which we disclaim. We do wish, however, to point out to the court wherein it seems to us that the *facts* of the case have been misunderstood

and to indicate wherein we have not been given the benefit of the facts shown by the record on this appeal.

The essential point, boiled down, is that the evidence shows that *all* of the stocks found in the Logan & Bryan pledge, the margin stock as well as the "fully paid" stock, was placed there *tortiously* and therefore the equities are equal and no preference should be accorded the latter stock. We are very earnest in our contention that the evidence shows that *all* the stocks were in the pledge *tortiously*, and will explain, as briefly as possible, wherein our contention is supported by the record and wherein Your Honors have misinterpreted or overlooked essential parts of the record.

**THE COURT IS IN ERROR IN ASSUMING THE EVIDENCE SHOWS THAT 100 SHARES OF MIDVALE WERE KEPT ON HAND FOR STEER.**

We wish first to show that *Gorman vs. Littlefield*, 229 U. S., 19, is not a controlling authority herein. That case was decided in favor of the claimant of the stock there in question on the ground that it was in the *broker's* possession at time of bankruptcy. We don't question the correctness of that ruling. When Mason & Owen failed there was found in their possession a number of securities claimed and identified by various customers. Those securities were promptly surrendered to the customers by the trustee in bankruptcy on the strength of the *Gorman* decision, for the simple reason that the stocks were not in the Logan & Bryan pledge but were in the possession of the *brokers*.

If this Midvale stock had been found in the broker's possession we would have surrendered it also.

Now, what we claim is that the court has erroneously assumed that the record shows that this Midvale stock *was* in the brokers' possession, thus bringing it within the ruling in the *Gorman* case, whereas the *contrary* is the fact.

In the opinion herein it is said:

"It is a fair presumption that Mason & Owen *kept 100 shares of Midvale stock on hand at all times for the customer.*" (Our italics.)

The above excerpt from the opinion seems to have resulted from a mistake on the part of the court as to what the record shows. The record shows affirmatively with great clearness that the Midvale stock *never* left the hands of Logan & Bryan. In the stipulated facts it is said:

"Steer has since said date (date of purchase) permitted said stock to remain in the hands of Mason & Owen's brokers, Logan & Bryan, and that said stock is now held by said Logan & Bryan in their New York office in the account of said Mason & Owen." (Record, p. 4.)

It was also stipulated that this was the *only* Midvale stock held by either Mason & Owen or Logan & Bryan (Record 6).

Appellee recognized that fact and stated on p. 5 of his brief that the stock was held by Logan & Bryan *since the date of purchase.*

So we say that the assumption by the court that the brokers (Mason & Owen) kept 100 shares of Midvale on hand is not supported by the record, but, on the contrary, the record shows *affirmatively* that the stock



claimed by him was *never* in the brokers' possession, having been purchased by Logan & Bryan and held by them "from the date of purchase."

Neither can it be claimed that Logan & Bryan held the Midvale stock for Steer because the letter of Mr. Sterling (one of the partners of Logan & Bryan) which was accepted as evidence by stipulation of the parties (Record 12) stated as follows:

"At the time we purchased the Midvale stock above referred to we had no knowledge, and never since then had any knowledge, of any kind that the stock was being purchased for any one but Mason & Owen." (Record 11.)

We therefore ask Your Honors to assume for the purpose of this petition that the Midvale stock was at all times in the possession of the pledgees, Logan & Bryan, and subject to the general loan.

#### THE RIGHTS OF MARGIN TRADERS.

Having, we trust, shown that the *Gorman* decision did not deal with a case where stocks were held under a pledge and does not preclude this court from considering and adjusting the equities as between so-called "margin" stock and "fully-paid" stock when they are found *commingled in one pledge*, we desire to explain what is meant by "margin" trading, and we wish to do this because we believe that Your Honors have an incomplete understanding of the status of "margin" stock.

In the opinion herein it is said:

"It does appear that the marginal traders paid Mason & Owen a percentage of the purchase price of their stocks and that the pledge of the stock so

purchased was necessary in order to borrow money to carry the unpaid balances. *Thus it is inferable that the credit of these pledged stocks enabled the bankrupts to speculate, and in such speculation they lost.*

“Under *SUCH* circumstances it would be inequitable to hold that Steer, who paid his money in full and who had no pledge or loan, should be required to pay more and thus reduce the losses of the marginal traders who were speculating on the market.” (Our italics.)

It is apparent from the above excerpt that this court intended to apply the rule that equality is equity but that where equities are unequal those having the superior equity will be preferred to those having an inferior equity. It is equally clear that the court was of the opinion (a) that the “margin” traders had actually or impliedly consented to the pledge of their stocks and (b) that it was the credit of those “margin” stocks that enabled Mason & Owen to speculate and cause the losses to the customers.

These two conclusions of the court are conclusions, or rather inferences, of *fact*, and we wish to respectfully point out that the facts are *exactly the reverse of what the court has accepted as facts*, that is to say, that the “margin” traders did not, impliedly or otherwise, consent to the pledge of their stocks (except for the amount of their unpaid balances) and that *it was the credit of the “fully paid” stocks and not the “margin” stocks that enabled Mason & Owen to speculate and lose*. If we are correct as to these points then the foundation for the alleged superiority of Steer’s equitable rights fails, and all the stocks will be similarly treated.

We wish to press this claim as strongly as possible. It is very important, as there are ten other customers with claims similar to the one at bar whose stocks are being withheld awaiting the disposition of this test case, and it is for that reason important that the facts be fully understood by the court so that the decision will be on the merits.

### WHAT IS A MARGIN TRADER?

Courts take judicial notice of business practices and of the general methods of carrying on the brokerage business. 23 *Corpus Juris* 65.

A "margin" trader on the stock exchange is a person who buys securities on the installment plan through the office of a stock-broker. The word "margin" is the technical or trade word used to denote a traders' equity in purchases made on the various Exchanges, either grain, stock, produce or other exchange, but the transaction is in all its essentials merely a purchase on the *installment plan* with the understanding that the balance of the purchase price is payable on demand.

There is nothing mysterious about a "margin" transaction, or reprehensible or discreditable in any way. It is a practice constantly followed by all the best banks of the country in selling bonds or other securities to their customers. The only difference is that when a customer buys through a stockbroker the installment paid by him, and which represents his "equity" in the stock, is called a "margin," whereas if he buys the same security through his bank on the same terms his first payment is called an "installment" and likewise represents his "equity."

In either case the customer is the owner of the security, and the stockbroker or the banker, as the case may be, is the pledgee of the stock and holds it as security for the payment of the balance of the purchase price. The customer has the right to pay up the balance of the purchase price and receive his stock, and the stockbroker or banker has no rights in the stock except those of a pledgee and he has no right to hypothecate the stock for a *greater* amount than the customer's unpaid balance and if he does so it is a *conversion of the stock*. (See authorities on this point *infra*.)

There seems to be a prejudice against "margin trading" that is the result of a misunderstanding. The public associates "margin trading" with stock gambling merely because most stock gamblers buy their stocks "on margin." If the same stocks were purchased from or through a bank his "margin" would be called his "equity" or "installment," but the two transactions, one through a stockbroker and the other through a banker, are identical.

Some speculators on the stock market who have large sums of money on hand pay for their stocks in full, instead of paying a "margin" and borrowing the balance, but that does not make them any the less speculators. That is to say, the question whether a trader pays cash for his stock, or part cash and the balance payable later, has nothing to do with the morality of the transaction.

The most notable example of "margin trading" was the sale of billions of dollars of Liberty bonds with which our Government financed the World War. The



bonds were sold to the public "on margin," i. e., the subscriber paid 10% down and the banks agreed to hold the bond purchased as security for the other 90%, and the bank became the pledgee of the bond to secure the unpaid balance.

The transaction was simply a purchase on the installment plan. *If the same bond had been bought on the same terms from a stockbroker it would have been called a purchase "on margin" and the broker would be the pledgee of the bond to secure the unpaid balance. The two cases are identical and in either case the purchaser or "trader" is the owner of the bond and his "installment" or "margin" represents his so-called "equity" in the bond, and in neither case would the broker or banker have the right to hypothecate the security to Logan & Bryan, or any one else, for more than the unpaid purchase price due on the security and if he did so it would be a conversion.*

The above explanation of margin stock follows *Richardson vs. Shaw*, 209 U. S., 365 and *Jones on Collateral Securities*, Sec 495, 496.

**THE MARGIN STOCKS WERE IN THE PLEDGE  
WRONGFULLY AND THEREFORE HAVE EQUAL  
EQUITIES WITH THE MIDVALE STOCK.**

Your Honors have decided that Steer's equities are *superior* to those of the margin traders and that for that reason the margin stocks should be sold first.

The record shows that the assets of Mason & Owen (including, of course, the sums due them from the margin traders) were insufficient by \$55,000.00 (Record 6) to pay off Logan & Bryan's lien, i. e., Mason & Owen



had pledged these customers' stocks for an amount at least \$55,000 greater than Mason & Owen's lien thereon. We concede that a broker has implied authority to pledge margin stock for a sum which, added to the down payment or "margin," amounts to the purchase price of the stock, but he cannot go beyond that and if he does he *converts the stock to his own use*.

In 9 *Corpus Juris* 544 it is said:

"He (the broker) is guilty of *conversion* if he pledges the stock purchased for an amount greater than the amount of his lien thereon."

In *Pierson's Estate*, 46 N. Y. Supp. 557 (560) it is said:

"Pierson & Son, by pledging the stock with White & Co., in an amount greater than their own lien thereon, and thereafter becoming insolvent, so that the customer could not obtain his stock upon payment of the amount of Pierson & Son's lien thereon, thereby *converted the stock* (*Chester vs. Dickerson*, 54 N. Y. 1, 11); that is to say, the firm was estopped to deny such pledge. The event—that is, Pierson & Son's insolvency—disabled the firm from complying with their contract, and thus *completed the conversion*. No demand of the money or stock was necessary, as such demand would only be cumulative evidence of the conversion. *Ganley vs. Bank*, 98 N. Y. 484, 494. As between the customer and Pierson & Son, the customer was the owner of the stock; Pierson & Son the pledgee thereof, with a lien for the amount unpaid thereon by the customer. Pierson & Son had no right to so subpledge the stock as to deprive the purchaser of the right to redeem it by paying the balance due upon it. *Chapman vs. Brooks*, 31 N. Y., 75; *Lawrence vs. Maxwell*, 53 N. Y., 23. The firm's pledge of the stock with White & Co., to secure the indebted-

on, this constituted an unlawful conversion.

the losses, is not warranted by the evidence, it follows that the conclusion from such premise, i. e., that Steer's equity is superior, must fall also, and we ask Your Honors to so hold.

### IN CONCLUSION.

In conclusion we say:

(a) The equities of all the pledged stocks are equal because all of them were *wrongfully* in the pledge, Steer's because it had been *paid for* and the margin stock because it was pledged *for more than the amount due thereon*.

(b) That it was not the margin stock that enabled the bankrupts to speculate and lose. *As between the fully paid stock and the margin stock the former was more responsible for the losses* because of its greater borrowing capacity when used as a part of the pledge.

We believe that every fact relied upon in this petition is supported by the record, but if Your Honors believe that there is any uncertainty as to any fact we ask that the cause be remanded for further hearing, to the end that a decision will be made upon the *merits*, and furnish a rule by which all other pending claims of customers against specific stocks may be disposed of without further litigation.

In any event we ask for a re-hearing.

Respectfully submitted,

WILL J. THAYER,

Appellant's Attorney.

Certificate of Counsel is filed herewith.

No. 3846

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CROWLEY LAUNCH AND TUGBOAT COMPANY  
(a corporation),

*Appellant,*

vs.

UNITED STATES SHIPPING BOARD EMERGENCY  
FLEET CORPORATION (a corporation), and  
the American Ship "MONONGAHELA", her  
engines, tackle, apparel, etc.,

*Appellees,*

UNITED STATES OF AMERICA,

*Claimant.*

BRIEF FOR APPELLANT (LIBELANT).

THACHER & WRIGHT,  
*Proctors for Appellant (Libelant).*

THOMAS A. THACHER,  
HARRISON A. JONES,  
*Of Counsel.*

FILED

MAY 3 - 1922

F. D. MONCKTON,  
CLERK.



## Topical Index

---

	Page
GENERAL STATEMENT OF CASE.....	1
THE LOWER COURT'S DECISION.....	5
SPECIFICATION OF ERRORS RELIED UPON.....	5
I. The opinion of the lower court and the law applicable to the case.....	9
II. No evidence was introduced to show that the lighter No. 76 when delivered to the charterer was unseaworthy; all the evidence as to her condition was that the lighter was in a first class, seaworthy condition	16
III. That the lighter No. 76 was overloaded and badly loaded was testified to by every independent witness who saw it before it sank, as well as by the majority of interested witnesses.....	19
IV. The Captain Mills theory.....	33
V. Ability to avoid the loss of the lighter.....	39
VI. The failure to trim the cargo was an act of negligence .....	42
VII. Conclusion .....	45



## Table of Cases Cited

---

	Pages
<i>The Adah</i> , 258 Fed. 377.....	42
<i>Charles Killam &amp; Co. v. Monad Engineering Co.</i> , 216 Fed. 438 .....	11
<i>Consolidated Coal Co. v. Knickerbocker Steam Towage Co.</i> , 200 Fed. 840 .....	50
<i>The Daniel Burns</i> , 52 Fed. 159.....	10
<i>Hastorf v. F. R. Long, etc., Co.</i> , 239 Fed. 852.....	10
<i>Know Your Own Ship</i> (14th Ed.), by Thomas Walton, p. 9	38
<i>Monk v. Cornell Steamboat Co.</i> , 198 Fed. 472.....	10
<i>The Robert R.</i> , 255 Fed. 37.....	43
<i>Schoonmaker-Connors Co. v. Lambert Transportation Co.</i> , 268 Fed. 102 .....	12
<i>Smith v. Bouker</i> , 49 Fed. 954.....	11
<i>The Steamer Southern Belle</i> , 18 How. 584, 15 Law. Ed. 493, 495 .....	50
<i>Swenson v. Snare &amp; Triest Co.</i> , 145 Fed. 727; 160 Fed. 459 .....	12, 15
<i>Terry &amp; Tench Co. v. Merritt &amp; Chapman D. &amp; W. Co.</i> , 168 Fed. 533.....	14
<i>White v. Schoonmaker-Connors Co., Inc.</i> , 265 Fed. 465..	11
<i>The Willie</i> , 231 Fed. 865.....	10, 40

No. 3846

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

---

CROWLEY LAUNCH AND TUGBOAT COMPANY  
(a corporation),

*Appellant,*

VS.

UNITED STATES SHIPPING BOARD EMERGENCY  
FLEET CORPORATION (a corporation), and  
the American Ship "MONONGAHELA", her  
engines, tackle, apparel, etc.,

*Appellees,*

UNITED STATES OF AMERICA,

*Claimant.*

---

## BRIEF FOR APPELLANT (LIBELANT).

---

### General Statement of the Case.

This is an action brought by the Crowley Launch and Tugboat Company for the destruction of its lighter No. 76 while in the possession of the charterers, the United States Shipping Board Emergency Fleet Corporation. The destruction of this lighter took place on Monday, December 15, 1919, while the lighter was lying alongside the American bark "Monongahela", then at Pier 36, San Francisco.

The American bark "Monongahela" was on that date owned by the United States and operated through the Emergency Fleet Corporation by Struthers & Dixon, Inc., of San Francisco, as operating agents. On Tuesday, December 9, 1919, Struthers & Dixon, Inc., orally chartered from the Crowley Company lighter No. 76, to be used to receive not over 400 *short* tons of ballast from the "Monongahela". On Wednesday, December 10th, the Crowley Company towed the lighter No. 76 alongside the "Monongahela" and left her with her lines fast to the bark.

The "Monongahela" had shortly before that time arrived from the Orient and, since strike conditions then prevailed at San Francisco, was discharging with a strike-breaking crew of stevedores. On Friday, December 12, 1919, the stevedores, in charge of a gang boss named W. C. Messick, began to discharge the ballast from the "Monongahela" on to the lighter. The ballast was a wet clay-like sand or gravel, and was dumped by cubic yard buckets filled in the lower hold and raised and swung over the lighter through power furnished by a donkey boiler on the pier at which the "Monongahela" lay.

This ballast was dumped on to the lighter Friday, Saturday, Sunday and Monday. On Monday afternoon, while this discharging was still going on, David Crowley, of the Crowley Company, happened to be going along the waterfront and noticed that something appeared to be wrong with the barge. He sent immediately for Wilder, the barge super-

intendent of the Crowley Company. Wilder shortly came down and found the lighter in a critical condition. He states that her condition was due to overloading and to the fact that the lighter was strained through improper loading and failure to trim. He told the stevedores to stop discharging and to trim the load on the barge.

Messick, the head stevedore, ordered the discharging stopped. He called the men up from the hold of the "Monongahela" and, for the first time, gave orders to trim the load. It was too late. The ballast had already begun to slide outboard, and the barge began to get lower on the outboard side. As the ballast slid from the piles the strain on the outboard side became increasingly greater. The steel cable and heavy lines from the "Monongahela" bound the barge to the ship and prevented the barge from dumping her load. Finally the strain on the outboard side of the barge became terrific; the lines were too powerful to break, and the barge collapsed with a roar like an explosion and became a total loss.

A libel was filed a few days afterwards against the bark "Monongahela" and the Emergency Fleet Corporation. This libel set out the delivery of the barge in good order and condition and her redelivery totally destroyed. The answer denied that the barge was overloaded, and set out that the loss was caused by the unseaworthiness of the barge.

Prior to trial the deposition of W. C. Messick, an employee of the stevedoring company, and who had

charge of the loading, was taken by the libelant. He admitted that he had overloaded the barge, had failed to trim her at any time prior to the last effort to save her, and that he had improperly loaded her. He testified that on the morning of the day the barge was destroyed he thought he had loaded all that he could get on the barge and asked the stevedoring company for another barge, but that this request was refused.

The depositions of the captain and a deckhand of a tugboat which was near the scene of the disaster were also taken. They testified that the lighter was improperly loaded and overloaded. Another stevedore located by the libelant corroborated the testimony of Mr. Messick.

The witnesses introduced by the respondents did not deny that the barge *had not been trimmed at any time during the entire loading*, and that it was not until the barge was in a sinking condition that the loading was stopped and the men ordered up from the hold for the now hazardous task of attempting to trim her. The respondents' witnesses did not deny that the lighter was buckled by the loading. They did not deny that one of the efficient causes of the collapse of the barge was the failure to loosen or cut the taut heavy lines between the barge and the ship after the load had begun to slide. They did not give a word of testimony to the effect that the barge was unseaworthy. They did not deny that a new barge was called for by the foreman of the stevedoring company on the morning of Monday,



the day of the accident, and that the superintendent of the stevedoring company refused the request.

The defense of the respondents was principally based upon their claim that less than 400 tons was loaded on the barge. This claim was made through the medium of an expert witness who based his theory as to the number of tons on the barge upon the amount of ballast alleged to have been delivered to the ship at Manila.

---

### **The Lower Court's Decision.**

The lower Court gave the following opinion:

“It is not established that more sand was loaded on the barge 76 than she was chartered to carry, and the method of loading was not improper. It is just as likely that the barge, being old, made more water than usual, and that this was the cause of her loss.

“The libel will therefore be dismissed.”

(Record, 292.)

---

### **Specification of Errors Relied Upon.**

#### **I.**

The opinion and order dismissing libel and the final decree dismissing libel and ordering and adjudging that the libelant take nothing are not warranted by the evidence, and are erroneous.

## II.

The District Court erred in the following respect: that whereas the only findings of the District Court were as follows:

“It is not established that more sand was loaded on the barge 76 than she was chartered to carry, and the method of loading was not improper. It is just as likely that the barge, being old, made more water than usual, and that this was the cause of her loss;”

and whereas the Crowley Launch and Tugboat Company chartered the barge to the respondents; the District Court in ordering the libel dismissed failed to apply the rule of law that to avoid liability for damage to a lighter in possession of the charterer the charterer must show: (1) how the damage occurred; (2) that it was not caused through its negligence, or through the negligence of anyone to whom the respondents had entrusted the barge.

## III.

The District Court erred in the following respect: that in making the above findings and entering the following order, “The libel will therefore be dismissed”, the District Court failed to apply the rule that the charterer (respondent) has the burden of proof to show freedom from negligence.

## IV.

The District Court erred in the following respect: that whereas the Court found the proof equally divided, and found that the respondents’ conten-

tions were "just as likely" as the libelant's, the Court failed to apply the rule that the respondents as charterers had the burden of proof as to how the damage occurred, and that it was not caused through the charterers' negligence, and failed to enter a final decree in said cause in favor of the libelant.

## V.

The District Court erred in holding that, since it was not established by the libelant that more sand was loaded on the barge than she was chartered to carry, and since it was just as likely that the barge made more water than usual and as likely that this caused the loss, the libel should be dismissed.

## VI.

The District Court erred in finding that it is not established that more sand was loaded on the barge 76 than she was chartered to carry.

## VII.

The District Court erred in finding that it is just as likely that the barge, being old, made more water than usual, and as likely that this was the cause of her loss.

## VIII.

The District Court erred in overruling the objection by the libelant to the introduction into evidence of an alleged bill purporting to have been made at Manila, Philippine Islands, and reading as follows:

“Manila, P. I., July 10, 1919.

“Struthers & Dixon,

Manila, P. I., agents Sailer ‘Monongahela’,

To Atlantic, Gulf & Pacific Company of Manila, Dr.

800 metric tons sand ballast supplied and put on board the ship ‘Monongahela’ at P.3.50 per ton, 2800”;

(Respondents’ Exhibit A):

which purported bill was introduced over the objection that it was incompetent, immaterial, irrelevant and hearsay.

## IX.

The District Court erred in admitting into evidence a purported invoice rendered to the “Monongahela” in Manila, to prove that the number of tons of ballast stated in the invoice to have been delivered was in fact delivered to the vessel; the correctness and the rendering of which invoice was testified to only by a port superintendent of Struthers & Dixon, Inc., in San Francisco, whose testimony was based on the fact that he found the alleged invoice in the files of his company in San Francisco.

## X.

The District Court erred in entering a final decree dismissing the libel herein.

## XI.

The District Court erred in refusing to enter a decree in favor of the libelant for the damages sustained by it by reason of the loss and destruction of its barge as set forth in the pleadings herein, with

interest and costs, and in not adjudging the respondents at fault for said loss and destruction.

---

## I.

### THE OPINION OF THE LOWER COURT AND THE LAW APPLICABLE TO THE CASE.

To understand the opinion of the lower Court, it is necessary to bear in mind that the respondents (charterers) concentrated their defense in the claim: the barge was chartered to carry 400 tons and only 400 tons were loaded on her. The libellant introduced testimony showing that considerably over 400 tons were loaded on the barge; the respondents that not more than 400 tons were loaded. The amount on the barge while important was, of course, merely one of the points at issue. It was emphasized by the respondents, however, as if it were the only point in controversy.

The Court in its opinion says "It is not established that more sand was loaded on the barge 76 than she was chartered to carry." In other words: It is not proved that over 400 tons was loaded on the barge. The Court then says: "The method of loading was not improper"; i. e. (and this is the only finding in the case): The *method* of loading was proper.

The Court then states: "It is just as likely that the barge, being old, made more water than usual, and that this was the cause of her loss." This raises



the question: just as likely as what? Undoubtedly the Court meant: It is just as likely that the loss was caused by unusual leaking of the barge as that the loss was caused by her overloading by the respondents.

The Court made no other findings. The respondents presented a form of decree to the Court in which the Court was to find that the barge was not overloaded and that it was properly loaded and that the loss was caused by the unseaworthiness of the barge. This decree the Court refused to sign and left the grounds of its decision as stated in the opinion.

This brings us to the first question: If an owner charters a barge under a demise or bare ship charter and if the barge is destroyed while in the possession of the charterer, and with admittedly a heavy loss, does the owner fail to recover if he cannot prove the barge overloaded—or is the burden of proof on the charterer to show that the barge was not overloaded and that she was carefully loaded while in its possession?

That a charter of a barge for use by a charterer constitutes a demise, has long been settled (*Hastorf v. F. R. Long etc. Co.*, 239 Fed. 852). So broad is this rule that it has been held that a charter of a barge without motive power will constitute a demise even where the owner keeps a man aboard, called captain by courtesy (*The Willie*, 231 Fed. 865; *Monk v. Cornell Steamboat Co.*, 198 Fed. 472; *The Daniel Burns*, 52 Fed. 159).

The general duty of demise charterers as bailees was summarized in *Smith v. Bouker*, 49 Fed. 954, where the Circuit Court of Appeals for the Second Circuit, in holding a charterer liable for the loss of a barge, said:

“It is elementary law that the hirer of a chattel impliedly undertakes to use it well, to use it for no other purpose than that for which it is hired, to take proper care of it, and to restore it at the time appointed. In all of these things he is bound to exercise the diligence of a prudent man; and for any default, whether his own personal fault or negligence or that of his sub-agents or servants, is responsible to the owner.”

In *Charles Killam & Co. v. Monad Engineering Co.*, 216 Fed. 438, the Court said:

“It is usual for a charter party to contain a stipulation for or warranty of the seaworthiness of the vessel on the one side, and, on the other, a stipulation or covenant to deliver up the vessel in the same good order and condition as when originally delivered, ordinary wear and tear and perils of the sea excepted. Each and both of these covenants are, however, implied whether expressed or not, so that, under the facts in this case, the findings of fact of express covenants are unimportant.”

But not only is the charterer or bailee of a lighter liable for his own negligence, but he is liable for negligence of a third party, although an independent contractor, whom he has permitted to use the lighter chartered or to perform any of the services for which it was chartered (*White v. Schoonmaker-Connors Co., Inc.*, 265 Fed. 465, 467).

The last word of law upon the effect of such a demise of a lighter is set out by the Circuit Court

of Appeals for the Second Circuit in *Schoonmaker-Connors Co. v. Lambert Transportation Co.*, 268 Fed. 102 (July 3, 1920). Here the Court said:

“It appears, and indeed is conceded, that when the Katterskill was chartered to the Lambert Transportation Company, respondent herein, she was in good condition, and that when the boat was returned she was in bad condition. It was therefore incumbent upon the aforesaid respondent to show: (1) How the damage occurred; and (2) that it was not caused through its negligence, or through the negligence of any one to whom the respondent had intrusted the boat.”

The above principle is in no sense new, and its application was worked out by the Circuit Court of Appeals in two leading cases. In *Swenson v. Snare & Triest Company*, 160 Fed. 459 (C. C. A. 2d, 1908), an action was brought by Johan Swenson, the owner of a pile driver, against its demise charterer for the loss of the pile driver through sinking. The charterer made the usual defense that the pile driver was old in 1901 and lying in the mudflats of New Jersey, and that water stood in her when he purchased her, four years previous to the sinking in question. The owner testified, however, that he had spent considerable money in repairing her and that she had worked satisfactorily after the repairs had been made.

“The testimony of a majority of the crew is to the effect that the driver turned upside down at the Brooklyn Bridge and shortly afterwards seemed to blow apart from the air and her deck-house and loose planks floated away and she

herself sank out of sight after drifting down with the ebb tide for 15 or 20 minutes.” (145 Fed. 728, Decision of the District Court.)

A subordinate employee of the respondent stated that at the time the pile driver was chartered he examined her and found her unsound. He further testified that she was so rotten that he could get a handful of wood by merely sticking his hand into her. The Court, however, remarked on the fact that this subordinate’s superior, who also examined the pile driver, was not called, and then said of the subordinate’s testimony:

“It appears to be entirely inconsistent with the boat’s actual condition at the time of hiring. It is evident that a pile driver in the condition described, could not have done her work for years, as she unquestionably did, and been safely towed around New York Harbor and up the East River as far as Flushing Bay.”\* (145 Fed. 729.)

There seems to have been no direct evidence as to why the pile driver capsized, although one theory adopted by the Court was that it was turned around suddenly and capsized as a result. The respondent was held liable for the sinking of the pile driver, and appealed.

On appeal the decision of the lower Court was affirmed. The Court said in part:

“It is admitted that the pile driver was chartered by the respondent from the libellant and that while in the exclusive possession of the

\* No attempt was made by respondents to show the lighter No. 76 unseaworthy.



respondent it sank and was lost. As such an occurrence is not in the ordinary course of things, the burden was thrown on the respondent as a bailee to show how the loss took place and that it was not caused by its negligence."

After referring to the testimony of respondent's witnesses as to the alleged unseaworthiness of the pile driver and as to the decision of the lower Court holding the respondents negligent, the upper Court stated:

"We need not go so far. It is sufficient for us to say that we have carefully examined the whole record, and in view of the findings of the trial court *are unable to hold that the respondent has sustained the burden of proof imposed on it by law.*" (Italics ours.)

*Terry & Tench Co. v. Merritt & Chapman Derrick & Wrecking Co.*, 168 Fed. 533 (C. C. A. 2d, 1919), involved the following facts:

"In August, 1906, the libelant chartered its derrick to the respondent. About a week later she was found to be leaking and was returned to the libelant for repairs. She was sent to a dry dock and repaired, and was returned to the respondent on September 14th, and was used by it and in its exclusive possession until September 20th, when the accident occurred. On the afternoon of that day she was loaded with stone at Weehawken, N. J., and was made fast alongside the respondent's tug, which started across the Hudson River. When about two-thirds across the river the derrick listed to starboard, capsized and sank. After hearing the evi-



dence the District Judge said, in substance, that she was sunk without known cause, resorted to a presumption that she was unseaworthy, and dismissed the libel."

This decision was reversed on appeal.

After referring to the opinion in *Swenson v. Snare & Triest Co.*, supra, the Circuit Court of Appeals said:

"These principles are applicable here. The vessel having been injured while in the exclusive possession of the respondent, as bailee, the burden is upon it to show:

(1) How the injury occurred.

(2) That it was free from negligence.

The respondent did show the circumstances of the accident, but offered no evidence to show the cause of the sinking of the vessel, and, to rebut the presumption against it, relied upon the presumption of unseaworthiness arising from the sinking of the vessel without apparent cause."

After stating that the presumption urged had no effect in the case, the Court said:

"In our opinion the respondent failed to sustain the burden of proof imposed upon it as a bailee in possession, and the decree was erroneous."

Reverting to the opinion of the lower Court in the present case, the lower Court has repudiated the doctrine of the above cases. It has held that when a vessel is lost or damaged while in the possession of a demise charterer, *the owner*, to recover, must show: first, how the loss occurred; and, second, that

it was caused by the negligence of the demise charterer. It further holds that if it is doubtful whether the loss occurred through negligence of the charterer or through the chartered vessel taking more water than usual,\* that doubt must be resolved against the owner of the vessel.

It is needless to point out the effect of such a change in the law. It brings about a condition under which, if a company charters a tug or lighter by demise and it is returned destroyed, the owner has no recovery unless he can find out—a most difficult task—what really happened to the vessel while the charterer had possession of it. The door is thrown wide open to the most careless handling of vessels by demise charterers, since in nearly all cases the only chance of recovery by the owner will be through evidence given by the charterers' own employees. To avoid such a travesty on justice the above rule has been established. How serious is the application of such a rule can be clearly seen in the examination of the evidence in the present case.

---

## II.

**NO EVIDENCE WAS INTRODUCED TO SHOW THAT THE LIGHTER NO. 76 WHEN DELIVERED TO THE CHARTERER WAS UNSEAWORTHY; ALL THE EVIDENCE AS TO HER CONDITION WAS THAT THE LIGHTER WAS IN A FIRST-CLASS, SEAWORTHY CONDITION.**

The respondents in their answer set out as a defense that the lighter was “weak, unseaworthy, im-

\*There is no testimony that it usually took water.

properly equipped and wholly unfit and unsuitable for the purposes for which it was chartered". In view of these positive allegations one might have expected that the respondents would have produced some witness to attack the seaworthiness of the lighter. Not a single witness was produced, however, and not one word of testimony was introduced by which the seaworthiness of the barge was attacked. Particularly to be remarked was the testimony of the respondents' witness Edward J. Wieder (Wieder, 171). This witness, the superintendent of the Peterson Launch Company, a rival of libelant's, stated that he had known the lighter "Crowley No. 76" for the past eight years (Id., 171), but did not even suggest that she was unseaworthy.

The libelant, in order to remove any doubt as to the seaworthiness of the barge, introduced considerable testimony. Summarized briefly, the testimony brought out that the Crowley Company, in order to keep its fleet of barges and other craft in good condition, maintains a shipyard in Oakland, employing some fifty men (Crowley, 73-74). Lighters are sent to this shipyard regularly for repairs in order to keep them in first-class condition (Westman, 111). The barge "Crowley No. 76" was at the Crowley shipyard in May, 1919, only seven months prior to her destruction. She was hauled out on the dry-dock for thirteen days, scraped, cleaned and painted and put in first-class condition (Crowley, 73; Westman, 111). In February, 1919, she had been in the yard and had had her fenders repaired, her top

strakes all around renewed and the stringer around the deck renewed (Westman, 112). Mr. David Crowley, the general manager of the Crowley Company, had carefully examined the barge between thirty and sixty days prior to her destruction (Crowley, 73), going below and checking up her condition. He found her in good condition (Crowley, 73). Before the lighter No. 76 went on the "Monongahela" job Wilder, general superintendent of the Crowley Company, went over the lighter, looking her all over below, and found her in first-class condition (Wilder, 82). He went over her again, going below, on Thursday, four days before the accident (Wilder, 82). On Saturday, two days before the accident, Sennott, the outside superintendent of the Crowley Company, had looked her over, gone below and found her in good condition (Sennott, 97-98).

That the barge was in excellent condition the year before the accident is borne out by the testimony of Mr. Madden, of the Hercules Powder Company, who testified that she carried the following loads of nitrates for his company:

June 7, 1918	465 short tons
July 3, 1918	539 " "
Aug. 10, 1918	532 " "
Oct. 31, 1918	419 " "
Oct. 26, 1918	429 " "

(Madden, 128.)

This nitrate was worth about \$90.00 per ton, and if the lighter sank the cargo would dissolve (Mad-



den, 129). Mr. Madden testified that he had been superintendent of transportation for the Hercules Powder Company for seven years, and that his duties included the examination of lighters used by his company (Madden, 127, 129). He examined the condition of the lighter "Crowley No. 76" and stated that he found her in good condition (Madden, 129).

---

### III.

**THAT THE LIGHTER NO. 76 WAS OVERLOADED AND BADLY LOADED WAS TESTIFIED TO BY EVERY INDEPENDENT WITNESS WHO SAW IT BEFORE IT SANK, AS WELL AS BY THE MAJORITY OF INTERESTED WITNESSES.**

The witnesses who saw the lighter No. 76 shortly before she was lost and who testified that she was then overloaded and improperly loaded were:

Independent:

W. C. Messick, gang foreman of San Francisco Stevedoring Co.\*

Edward Jones, stevedore of San Francisco Stevedoring Co.

Louis Langren, captain of tug "Reliance."

E. H. Zecher, deck hand of tug "Reliance."

Interested:

David Crowley, vice president, Crowley Launch and Tugboat Co.

\*While Messick and Jones are above termed independent witnesses, as employees of one of the respondents at the time of the disaster, it is natural to believe that they were interested in having the San Francisco Stevedoring Company held blameless. It seems almost incredible that a man like Messick would confess to overloading a barge if it were not true.



J. W. McAndrews, Crowley Launch and Tugboat Co.

J. J. Wilder, former superintendent, Crowley Launch and Tugboat Co.

The witnesses who testified for the respondents as to the condition of the lighter No. 76 before she sank were:

Interested:

James Woodside, superintendent of the San Francisco Stevedoring Co. (third party respondent in case).

W. W. Scott, port superintendent for Struthers & Dixon, Inc. (operators of the "Monongahela").

Marvin Brooks, stevedore of San Francisco Stevedoring Co., who saw barge only when she was sinking.

W. C. Messick was "the foreman or hatch tender on the 'Monongahela' " (Messick, 223), and "as far as the San Francisco Stevedoring Company was concerned had entire supervision of the job" (id. 227). The San Francisco Stevedoring Company was a third party respondent in the action, and admittedly had charge of the loading of the lighter (Record, 27).

Messick's testimony gives a full account of the loading and the destruction of the lighter. Mr. Messick testified that at the time of the taking of his deposition he was an engine foreman for the Southern Pacific Company (Messick, 223). In December, 1919, he was foreman or hatch tender on the

“Monongahela” and employed by the San Francisco Stevedoring Company (id. 223). He was known as “Tom McCue”, because the violence prevailing during the strike made it advisable not to use one’s correct name (id. 223, 224). The “Monongahela” was moored at the dock, and on about December 10, 1919, the lighter No. 76 was brought alongside (id. 225), and used to receive ballast (id. 225). This ballast was a gravel, sand and clay mixture, very cakey and very wet (id. 225). Messick started loading the barge on Friday and continued Saturday, Sunday and Monday (id. 226). He loaded the ballast upon the barge by means of buckets raised from the hold and dumped on the barge (id. 226). The ballast was dumped into four piles, or cones. The first cone was piled as high as it would go without the ballast running over the side, and the barge was then moved and another cone built up (id. 226).

The number of buckets of ballast totalled:

Friday,	December 12,	A. M.	68	buckets
		P. M.	52	“
Saturday,	December 13,	A. M.	80	“
		P. M.	63	“
Sunday,	December 14,	A. M.	85	“
		P. M.	65	“
Monday,	December 15,	A. M.	75	“
		P. M.	58	“

---

546 buckets

(id. 226, 227.)

These buckets ran full all the time. There was no use in bringing the buckets up light, since they are built in such a manner that they must be loaded in order to dump easily (id. 227). Messick was on the "Monongahela" at all times during the discharge.

"A. Monday I was loading on the last portion of the barge, the stern of the barge, and I got that pretty well filled up at noon time, getting pretty well along, so I spoke to Woodside, Jim, at noon, when he came around and asked me how things were going.

Q. Jim who? A. Woodside. I asked him—I said, 'You had better give me another barge.' 'Well,' he says, 'No, that will do you all right,' he says; 'All we want to take abaft there.' I says, 'All right, then.'

Q. Pardon me for interrupting, but why did you want another barge? A. I thought I was getting about all I could get on her. If I wanted to continue to work and work the men, why, I would have to get some more room to work in. That is all. I couldn't dump overboard; that was a cinch. That is the reason.

Q. What did you say that Woodside said when you asked him for another barge? A. He said that that barge would hold. I could get on there everything that was wanted to get up.

\* \* \* \* \*

A. There was a Crowley man on board at about 10:30 in the forenoon and he was asking me how much more we were going to put on there, and I told him I didn't know, *I didn't think it would hold much more.* \* \* \* That is the reason I spoke to Woodside about it at noon as well. \* \* \* Well, I still continued to unload on the barge. *I would load her until she sunk right there, and any man will do as he is told.*" (id. 228, 230.) (Italics ours.)

Mr. Messick continued:

In the afternoon I continued to dump buckets on the stern. About three o'clock one of the men called to my attention that she was down by the head pretty strong. So I had the barge moved up a little bit and I told the men to dump the buckets on the diagonal corner away from the corner that was down. (id. 230.) There were four cones, or mounds, of ballast on the barge. One cone began sliding, but I kept on loading more and more, trying to straighten out the list. (id. 233.) Other cones began sliding toward the outside and the barge had considerable list. At about 3:50 or 4 o'clock the mate of the 'Monongahela' said, 'That is enough', and he wanted me to put on three or four buckets of rubbish, which I did. (id. 233, 234.)

"So I think I brought three or four buckets of that, when the two men that was out on the barge called over and said, 'Tom, she is going down by the head there', he says. I says 'The best thing we had better do is to put the men on and trim her'. I went over to the side and took a look at her and said, 'I will get the men up and trim her'." (id. 234.)

"Q. There had not been anybody on her to trim her before? A. No. I had just these two men at the buckets and the rest of the men were in the hold." (id. 234.)

By the time the men got down on the barge she was awash, so I called the men back to the 'Monongahela'. (id. 234.) There had been a Crowley man down on the 'Monongahela' at about 4 p. m. He just as good as told me to stop loading on the barge immediately, and then he went off as if he was looking for someone with more authority. (id. 236.)

The lighter was fastened to the 'Monongahela' by three 6 or 8-inch Manila lines and one steel cable. These lines were tight. After the men got back on the 'Monongahela' I stood and



watched the barge. She listed more and more until the weight became so heavy on the outside that something had to go, and then the whole barge collapsed. Either the lines had to break or the lighter had to break, and the lines held. (id. 236, 237.)

This was the testimony of the boss of the job, the employee of the San Francisco Stevedoring Company, made a third party respondent in the action.

Edward Jones, also a stevedore employed by the San Francisco Stevedoring Company on the "Monongahela", corroborated the testimony of Messick; that Messick bossed the job (Jones, 54), that the ballast was wet (id. 54), that the buckets were full (id. 58), that on Monday some time prior to its destruction the barge was listed, that the heaps of ballast were 16 to 18 feet high by Monday noon (id. 55). He testified:

"A. I know positively that I heard McCue say—

Q. To whom? A. That the barge was really loaded—telling the mate.

\* \* \* \* \*

A. I could not state for sure whether it was Sunday afternoon or Monday morning. You see, that is a long time ago. A. Anyway, the mate told him that there was not a great deal more to be put on there and it would hold it, and McCue says, 'All right, we will go ahead and put it on'.

Q. When you came back from lunch, what was the condition of the lighter? A. The barge was listed pretty bad." (id. 56, 57.)

Jones further testified:

At 2 o'clock I helped shift the barge ahead so as to put more sand on the outer corner to



try and level up the barge. I then went back into the hold and worked until about 4 o'clock sending up ballast. (id. 57, 58.) Messick called us up then and wanted us to go down on the barge and trim it. (id. 58.) I did not go, as when I reached the deck the barge was tipping up. (id. 59.)

Mr. Jones watched the collapsing of the lighter, and his testimony is of interest:

“Q. Describe what you saw. A. The barge was tipping up at the corner, and the sand had commenced, at the time I got up there the sand had commenced to slide down off these cones over the edge of the barge into the water.

Q. How about the lines? A. And the lines were beginning to tighten \* \* \* because the barge, going down, tightened the outer lines; it would have to tighten them; it could not keep from tightening them; it tightened them and held the barge there.

Q. Continue. A. The barge, when the sand commenced to slide down—this cone was naturally just sliding over, and the barge, I could see it, was turning over, and the bottom of the barge caught against the boat and was completely demolished—over she went, and up went everything that you can think of, as high, almost, as the mast of that boat, dirt and everything else, just like a terrific explosion.

Q. How badly was the barge broken by this explosion? A. It was broken all to pieces; the sides were torn away—it just caved right away from the forward end next to the boat, and swept loose there; big heavy iron bolts about an inch or an inch and a quarter through pulled right out of it.

Q. Why didn't the barge simply dump? A. She could not.

Q. Why not? A. The weight naturally tore it to pieces, because it was caught against the boat.

Q. Why didn't they cut the lines? A. That is what I wanted them to do; I wanted them to cut the lines and let the barge swing over and save the barge; I told them to, but, no, they would not do it; they tried to put another line on it.

Q. To hold it tighter? A. Yes." (id. 59, 60.)

Louis Langren, captain of the Red Stack tug "Reliance", and a disinterested witness, saw the lighter No. 76 shortly before she collapsed. His tug was between Piers 34 and 36, engaged in taking out the steamer "Seiyo Maru"; and he had a clear view of the lighter lying on the south side of Pier 36. His testimony is clear and explicit:

"Q. When did you last see her afloat? A. At about 4:15 or 4:20.

Q. Where was she lying then? A. Alongside of a ship on the south side of Pier 36.

Q. You saw her from where? A. From the deck of my tug.

Q. In what condition was she? A. She was very heavily loaded and apparently buckled: her forward end, the out-board end, the end toward the bay, was apparently square, and the in-shore end and the out-board end away from the ship was considerably lower than the forward end, apparently buckled 12 or 14 inches.

Q. How was she loaded? A. Very top-heavy; heavily loaded.

Q. What condition was she in to tow? A. Very unsafe condition.

Q. Why? A. Overloaded; top-heavy.

Mr. GRIFFITHS. I object to that unless he knows what sand was on her; he simply looked at her.

Q. What experience have you had in lighters, captain? A. About three years—probably

six years all told; 14 years, all told, I have been working on this bay, towing lighters and vessels, and 6 of those years I was working for the San Francisco Quarries and Gray Brothers, towing rock barges and lighters of all descriptions.

Q. Can you tell by looking at a lighter whether she is top-heavy? A. I certainly can.

Q. What would you say the effect of the loading of the kind you saw on the lighter would be on that lighter? A. From the position I saw the lighter in, I would say she would open up her seams and break her back.

Q. Why? A. Because she was buckling, she was unevenly loaded; the out-board corner was more heavily loaded than the amidships section of the barge, having a tendency to twist the barge, and break the barge's back, and open up the bottom seams and side seams, causing the barge to take in water.

Q. After you saw her in that position, when did you see her again? A. After I had pulled this ship out—this entire time I had a hawser on the 'Seiyo Maru's' stern, pulling up against the ebb tide, and I had the south side of Pier 34 or 36 entirely open, and the barge was in plain sight all the time, and there was a sort of explosion, and the sand was apparently rolling down, and apparently she had broken her back and opened up." (Langren, 194, 195, 196.)

The deckhand of the tug "Reliance" also saw the lighter No. 76, and testified that she was in a top-heavy condition (Zecher, 213, 214).

Mr. David Crowley, vice president and general manager of the Crowley Launch and Tugboat Company, testified that on Monday afternoon he was driving along the waterfront in an automobile when

he noticed the condition of the lighter No. 76. He saw that she had a list to starboard, that she was loaded very deep and that the cones of ballast were unevenly loaded (Crowley, 69). He sent Jim McAndrews to telephone to the office about the barge (Crowley, 70).

McAndrews' testimony is short and to the point:

"Q. When was the last time that you saw this barge 76 afloat? A. Monday, about between 3 and 4 o'clock.

Q. Where were you? A. I was with Mr. Dave Crowley in a machine going along the seawall.

Q. Will you describe her appearance? A. She was alongside of the 'Monongahela', port side to, and they were dumping sand on her, piles, and she had a heavy list to starboard, and I says to Dave Crowley, 'Gee, they are overloading that barge'; he said, 'Go and 'phone in to Wilder', and I went to the 'phone at the Pacific Mail wharf and 'phoned in for Wilder, and came back and got in the machine with Dave Crowley, and drove down to Pier 14. That is all I know about it.

Q. How high were the piles? A. I should judge about 10 to 12 feet, I guess.

Q. What would be the effect of the loading as you saw it, upon the barge? A. I thought that she was overloaded.

Q. What would be the effect of the overloading? A. It would buckle and bust her in half, or capsize." (McAndrew, 107, 108.)

J. J. Wilder testified that he was at the Crowley Company office at Pier 14 when McAndrews telephoned for him (Wilder, 83).

"A. He told me that the barge looked in rather poor shape, that I had better get over



there and take a look at her, that she had quite a list, so I got over there, which took me about ten minutes to do, so in looking over the side of the ship—

Q. Looking over the side of what ship? A. The 'Monongahela'.

Q. You went aboard the 'Monongahela'? A. Yes.

Q. Then what? A. I took a look at her, and I turned to the hatch tender—

Q. You took a look at her from where? A. From the deck of the vessel first, and I saw her condition, I saw where she was badly listed, and she appeared to me to be badly strained, so I went right down on board, and down into the hold on the starboard side.

Q. The hold of what? A. The barge, and I saw it was a case of get a pump over there, that the barge would not last.

Q. Why? A. On account of the incompetent loading.

Q. How was it incompetent? A. In loading the barge they worked too long amidships, causing a strain on the barge, in other words, a sort of buckle, a settling down, which no doubt opened up some of the butts or seams; the water then was just about even with the deck.

Q. Where? A. On the starboard side.

Q. Forward or aft? A. Right amidships, and the barge was gradually settling; so I heard that water coming in, and I came up out of the hold, and I sung out to the fellows that were on the piles dumping these tubs—they only dumped about one while I had gone down and come up from the hold again—

Q. They were still dumping? A. They were still dumping.

Q. Then what? A. I says to them, I says, 'What the hell are you trying to do, dump this barge, or break her in two, which?'

Q. Who did you say that to? A. I said it both to the men on the barge, and also to the



fellow that appeared to be the boss; he told me his name was McCue.

Q. What did he say? A. He said, 'I can't see anything wrong.' I said, 'Why can't you?' I said, 'Take a look over the side. What is the matter with you? Are you a dummy?' He said, 'I can't see the other side of the barge on account of these peaks, they are too high.' I said, 'Certainly, they are too high.' I said, 'The best thing you can do is to get your men out of the hold and trim it, if it can be done now.' " (Wilder, 83, 84, 85.)

Wilder immediately left for the Crowley office to get a large gasoline pump (id. 86).

To this uniform testimony of both interested and entirely disinterested witnesses, what answer do the respondents make? Two employees, W. W. Scott, port superintendent of Struthers & Dixon, Inc., the operator of the bark "Monongahela," and James E. Woodside, general manager of the San Francisco Stevedoring Company, who were on the "Monongahela" only occasionally during the loading, were introduced to testify that at about 3:30 the lighter "was on an even keel".

J. E. Woodside testified that he looked down upon the barge from the deck of the "Monongahela" about an hour before the barge sank and that at that time she appeared to be on an even keel (Woodside, 169). He did not deny that Messick had told him before lunch that the barge was fully loaded and that another barge should be put in. He did not deny that the barge appeared to be overloaded. He did not state that the freeboard of the barge showed that

the barge had a sufficient margin of safety. He simply stated that an hour before the collapse the lighter, as she looked from the deck of the "Monongahela", appeared to be on an even keel.

This may possibly have been so, and yet the barge may have been extremely tender, overloaded, badly loaded and strained. That she was all of these things is borne out by the testimony of libelant's witnesses, and that the center of gravity was high and that she was tender is not denied by the respondents.

This brings us to the consideration of the question of time. Langren, testifying from his log, stated that he was off Pier 34 from 4:20 to 4:55 P. M. Before he left the lighter had collapsed (Langren, 205). Wilder testified that he was telephoned to by McAndrew that the barge was listing; that it took him about ten minutes to get over to look at her (Wilder, 83); that it was then 4:10 (Wilder, 87); that he arrived back again just as she was going down at 4:40 (Wilder, 89; Sennott, 99). Messick testified that the loading of ballast stopped at about 3:50 (Messick, 233); and that then the loading of the rubbish began (Messick, 234).

Thus, admitting the testimony of Woodside to be correct—that when he saw the lighter about an hour before she collapsed, or at about 3:40, she was on an even keel—this is not necessarily in conflict with the statements of the other witnesses. There is no denial of Messick's statement that at 3 o'clock the lighter had a pronounced outboard list (Messick,

230), and that he had the barge shifted and started to put ballast on the corner diagonally opposite (Messick, 230). There is no denial that when Crowley and McAndrews saw the lighter at about 4 o'clock she had a serious list. There is no denial of the condition of the barge when Wilder arrived at 4:10, or that the cones were then rapidly slipping (Messick, 233, 234). There is no denial that the lighter was badly buckled when Langren saw her at 4:20. The whole situation seems clear: the barge was fully loaded at noon; she took a bad list at about 3:00 o'clock; Messick had previously protested and been ordered to continue; he dumped on the end opposite the list; this brought the listed corner up, but the strain was too much for the barge, and toward 4 o'clock the cones of ballast began to shift and the lighter commenced to buckle; the more the ballast slid, the more the lighter listed, and this caused additional amounts to slide; the buckling opened the seams, and by 4:30 the barge was lost—unless the lines were cut and she was permitted to dump.

W. W. Scott testified that at about 3:30, shortly before Woodside saw the barge, she lay on an even keel. What has been said as to Woodside's testimony applies equally to Scott. Like Woodside, he denied nothing; so that here we have only the testimony of an interested witness that at 3:30 the lighter appeared from the ship to be on an even keel.

The astonishing thing about the case of the respondents is, that they failed to call the very wit-

nesses who at all times were on the job and who saw what did happen. The mate of the "Monongahela" was continuously on the "Monongahela", directing the discharge. He was not called. The stevedore employees working on the barge itself were not called. The only witnesses called were those who did not and could not see what happened.

The above—except for certain theoretical testimony of an expert, Captain Mills, who was called to prove that, based on various presumptions as to what was done in Manila, the barge could not possibly have been overloaded—constituted the respondents' case. This "Captain Mills' theory" was so emphasized by the respondents in the Court below that it will be separately dealt with here.

---

#### IV.

##### THE CAPTAIN MILLS THEORY.

When the destruction of the No. 76 occurred the Crowley Launch and Tugboat Company made an immediate investigation of the cause of the loss. To check the uniform statements of witnesses that the barge was heavily overloaded, the Crowley Company made an independent calculation. It secured from the hold of the "Monongahela" a sample of the ballast and had it weighed by one of the leading firms of analytical chemists in San Francisco,



Messrs. Curtis & Tompkins (McElligott, 95; Jones, 96). The weight was ascertained to be 81.5 lbs. per cubic foot. The buckets used in discharging were measured and found to contain one cubic yard (Dickie, 116). Messick stated that the buckets ran full, and from his tally book it was ascertained that 546 buckets of ballast had been dumped on the barge.

**This figured:**

<b>Buckets</b>	<b>546</b>
<b>Weight per bucket (27 cu. ft. at 81.5 lbs. per foot)</b>	<b>2,200.5 lbs.</b>
<b>The weight of ballast loaded on the barge</b>	
<b>was therefore 600.7 short tons*</b>	<b>(1,201,473 lbs.)</b>

This checked with the statement of the witnesses and showed a very large overloading of the barge—and a wide margin in case some buckets were not completely filled.

In opposition to the uniform testimony of witnesses and the above exact calculation of libellant, the respondents offer the theory of one Captain W. F. Mills, a surveyor in San Francisco, employed by themselves. Some time after the accident Captain Mills went to the “Monongahela” and computed the amount of ballast left in the ship.

Mr. Mills testified that by looking from the dock he saw the draft of the ship to be 8 feet 8 inches forward and 11 feet 8 inches aft,—a mean draft of 10

**\*Short Tons:** In chartering barges in San Francisco, when a barge is ordered of so many tons, short tons is meant (Crowley, 188).



feet 2 inches (Mills, 179).<sup>\*</sup> From this mean draft he proceeded to compute the amount of ballast left on board the "Monongahela", by means of the ship's displacement scale—a scale apparently made up when the ship was built, some twenty-seven years before. He admitted that if there had been changes made on the ship during her years in English and German hands, such changes would have made the displacement scale incorrect (Mills, 183). The only change that he actually knew of was the addition of a donkey-house forward; but he did not make allowance for this in his computation (Mills, 180). He presumed the ship had been scaled several times, and he said that this would make the displacement incorrect (Mills, 182).

With this displacement scale in hand he calculated as follows:

Dead weight at mean draft of 10 ft.

2 in.....475 long tons

He then estimated the stores and dun-

nage at..... 50 long tons

---

From which he calculated the ballast

left on the "Monongahela" to be.....425 long tons

(Mills, 175.)

<sup>\*</sup>Just when Captain Mills took the draft of the "Monongahela" is not clear. He testified first that it was "on the afternoon of December 15th, toward the close of the discharge" (Mills, 174). He later testified that "it was four or five days prior to "December 22nd"; and again that it was "somewhere about the 15th or 16th. I have no notes of that" (Mills, 178). It seems certain that this witness must have known whether he took the draft before or after the accident. His answers make it almost certain that he took the draft after the accident, and at a time when he must have known that his employers would probably be sued for the loss of the lighter.

An examination of the displacement scale introduced showed that Mills used the fresh water and not the salt water column of the scale, although the draft was alleged to have been taken on San Francisco Bay. His testimony in this regard in open Court ran, in part:

“Q. That gives you 10 feet 2 inches; taking that on the ship’s scale that we had here, you get what? A. 475 tons of cargo—of whatever is on board the ship.” (Mills, 176.)

When, on deposition, it was pointed out to him that he had given an incorrect statement to the Court, he testified:

“Q. Why did you enter it at 475 in your estimate, when you were making up that table that went before the Court? A. To make a conservative figure, not to over-estimate the amount.” (Mills, 287.)

In other words, Captain Mills admits that he testified incorrectly to the Court, but states that he gave his testimony, which was 50 tons out of the way, in order to be conservative.

Working with the above figures of 425 long tons, the computed amount of ballast left aboard ship, he then took a statement rendered from Manila billing the ship for 800 metric tons of ballast. Presuming that this was the exact amount of ballast delivered to the ship at Manila, he figured that there was placed on the barge the difference, or 406 short tons (362.5 long tons).\*

\* The barge was chartered to carry 400 tons (W. W. Scott, 134). Captain Mills stated that he did not include in his calculations a new donkey-house, engine and boiler which he stated might have weighed seven or eight tons (Mills, 181).

After the trial the proctors for the appellants happened to be examining some photographs which showed the stern of the "Monongahela". These photographs had been taken the morning after the destruction of the lighter. To their surprise, they noticed that the draft mark aft on the "Monongahela" was not 11 feet 8 inches, as testified to by Captain Mills, but was approximately 10 feet 8 inches (Swadley, 259, Exhibits A and B). In other words, Captain Mills' testimony was one foot incorrect on the stern draft.

Assuming that the respondents' witness was not in error as to the draft forward as well as aft,—and his incorrect testimony does not make this assumption reassuring,—there still was an error of six inches in Captain Mills' calculation of the mean draft. By application of the displacement scale, this error of six inches of mean draft results in showing that there were 168 short tons (150 long tons) more on the barge than Captain Mills testified. If the weight of 406 short tons (362.5 long tons) on the barge as calculated by Captain Mills was a correct calculation, based on an 11 foot 8 inch draft aft, this addition of 168 short tons (150 long tons) brings up the discharge, by Captain Mills' own figures, to 574 short tons.

The close calculation of the amount of deadweight capacity in a ship by a man standing on a deck and looking down at her draft marks at the bow and stern, exposed to the lap of the waves, is obviously

impossible.\* At best it can be only a rough approximation—where the difference of a few inches means a difference of more than one hundred tons of cargo. The photographs (Exhibits A and B) show how difficult such an attempt is.

Here Captain Mills testified incorrectly as to what the displacement scale showed in order to be “conservative”. The photographs showed that in addition he gave the stern draft incorrectly. He used as the basis for his calculation a displacement scale evidently made up when the ship was built, about 1892. He admitted that any structural change on the ship would make the displacement scale incorrect. He did not know whether any changes had been made. He further took as the basis of his computation an alleged amount of ballast received at Manila. No one testified as to whether or not, when the bark reached Manila, she may not have had a certain amount of ballast already in her. No one testified as to whether further ballast was not loaded after the 800 tons alleged to have been loaded. The ballast was very wet when loaded on the lighter. The ship arrived in the rainy season, and it seems entirely likely that the ballast was dry when loaded on the ship and wet when discharged.

\*Thomas Walton, in his standard work, “Know Your Own Ship”, says:

“The ‘tons per inch’ curve is thus a means of roughly checking the weight added to, or removed from the ship. The method would be more exact if it were possible to measure the ship’s draught at the stem and stern post accurately. The surface of the water, however, is seldom smooth enough to permit of precise measurements being taken.” (page 9, 14th Ed.)



This would account for a large increase in weight over what the same quantity weighed in Manila.\*

Failing to take into account the above considerations, the respondents further, by their various presumptions, unsupported by any evidence, and by a mass of theory instead of the testimony of their own employees on the ship, whom they did not wish to call, have sought to prove that the barge could not have been overloaded.

---

## V.

### ABILITY TO AVOID THE LOSS OF THE LIGHTER.

The testimony of Mr. Messick, substantiated by that of Mr. Dickie, was that a dual cause of the destruction of the lighter was the failure to cut the heavy lines which bound her tightly against the "Monongahela", with the result that the pressure on the outboard side of the barge caused the inboard side to be jammed against the iron ship until the pressure became so great that the lighter collapsed. No one has disputed the fact that if the lines had been loosened or cut, the lighter would have swung clear, dumped her load, and remained intact.

Eliminating all other evidence, the charterers are liable for their failure to cut the lines and let the barge dump.

\*There was no testimony as to the water in the "Monongahela's" bilges at the time the "Monongahela" was discharged. Water in the bilges is normally to be expected after a long voyage; yet such water was not considered by Captain Mills in urging his theory of the displacement scale weighing.



*The Willie*, 231 Fed. 865 (C. C. A. 2d, 1916), is in point. The facts in this case were as follows:

“The Borough Development Company is a corporation engaged in the business of transporting ashes and other refuse for the City of New York, and has a dump at the foot of Fulton Street, Brooklyn, where it loads scows for that purpose. May 15, 1913, the scow Thomas Connell was lying loaded under the dumpboard with the light scow Ward outside of her. \* \* \* As this was being done the load on the Connell shifted against the starboard rail, broke it, and opened up a seam on the deck through which she took on water. This gave her an outboard list, which gradually increased, with the effect that the Connell’s bilge was brought with an ever increasing pressure against the bottom of the light scow Ward A and a constantly increasing strain was put upon the lines. An effort was made to correct the list by trimming the cargo of the Connell, but without success, and she tore off several planks from the bottom of the Ward A, causing her to sink and shortly after sinking herself. It is said by some of the witnesses that all this could have been prevented if the captain of the Ward A had let the Connell’s lines go. *The circumstances, however, show that it would have been impossible to do this because of the strain on them, and that the only remedy would have been to cut the lines. The District Judge found that when the captain was about to do this he was stopped by Curran, who told him that he would be arrested if he did so. (Italics ours.)*

“The libelant insurance company, having paid the damages sustained by the Ward A, filed a libel against the Borough Development Company, the tug Willie, and the scow Connell, charging each with fault. *The District Judge, finding no fault with the tug, dismissed the libel as to her, and also as to the Connell, on*

*the ground that her fault, if any, was not the proximate cause of the injury, but that the Borough Development Company was solely at fault, because its foreman, who was in charge of both scows, by his order to the captain of the scow Ward A, prevented the last chance of saving her. We agree with the court as to the fault of the tug and the fault of the Borough Development Company, but we think that the scow Connell should not have been exonerated."* (Italics ours.)

The Court points out that the reason for holding the scow Connell liable *in rem* is that it was the scow Connell which actually damaged the Ward A, although her doing so was caused by the Borough Development Company.

This case is similar to the present case. The pressure on the outboard side of the "Crowley 76", causing pressure against the iron ship "Monongahela", broke that lighter, whereas the pressure on the outboard side of the scow Connell causing pressure against the wooden barge Ward A, broke the Ward A. In either case cutting the lines would have saved the barges. In the Willie case, the failure to cut the lines was held the proximate cause of the disaster. In the same manner Messick or the mate of the "Monongahela" could have saved the "No. 76" by cutting the lines. This they failed to do, and the pressure increased until the lighter "No. 76" collapsed.

## VI.

THE FAILURE TO TRIM THE CARGO WAS AN ACT OF  
NEGLECT.

It was stated by Messick, and was not denied by the respondents, that the barge was not trimmed prior to about 4:10, when the men were called up from the hold of the "Monongahela" to trim the lighter. It was then too late. One of the vital questions in this case, therefore, is: Are charterers of lighters or other vessels allowed by law to dump freely on such vessels without distributing the weights by trimmings; or should they trim bulk cargo, thus equally distributing the weight? In this connection two cases are of interest:

*The Adah*, 258 Fed. 377 (C. C. A. 2d, April 16, 1919) involved the following facts:

C. A. Fox owned the deck scow *Adah*. She was chartered to carry "ore or 'copper concentrate' (a sticky, clayey substance that will not run and distribute itself like sand or crushed stone)".\*

The lighter was figured to carry 765 tons, but was loaded with not over 743 tons. While starting to tow her from her loading berth she careened, dumped her load and struck and injured the *S. S. Uller*, from which she had been taking the concentrate. The owner of the *S. S. Uller* sued Brady, the stevedore on the job. Brady brought into the suit Fox, and Beer, the owner of the cargo. Brady and

\*E. S. McElligot, a chemist of Curtis & Tompkins, San Francisco, who examined a sample of the ballast, testified as to its nature: "It would pack; it was not free running sand at all." (McElligot, 96.)

Beer claimed the Adah unseaworthy. The Court held Brady liable for failure to trim the scow.

The Court said, in part:

“When a tight boat capsizes in calm water, the inference is almost irresistible that her action is due to the disposition of her load. But we do not rest on the inference; it is positively proven, and by Mr. Brady himself, that no trimming was done, the material was dumped approximately amidships, and left to ‘run when it got piled high enough’, but only the ‘dry part would run’. And by other witnesses it is shown that before a full load was put on the Adah the deck was awash on the port side, and she was heavy by the stern. We find that this was the reason why the 25 tons additional that she ought to have carried were never put aboard, and why she was removed from the Uller’s side. We also accept the testimony that this combination of longitudinal and transverse unevenness is peculiarly dangerous, and find that the Adah was in such a condition of instability that the oscillations caused by hauling her across the tide (slight as they must have been) were enough to tip her over.”

*The Robert R.*, 255 Fed. 37 (C. C. A. 2d, 1918), involved the following facts:

The lighter Robert R. was chartered to transport copper ore from the S. S. Prinz Frederick Hendrik. Stevedores were employed by the charterers. “The lighter was loaded by the stevedores so that there was but little more weight of ore on one side than the other; but the ore was not spread, and the center of gravity apparently became so high, because of the deep pile of ore along the center of the deck, that finally a single bucket of ore, weighing about



*half a ton, tilted the lighter, the stern corner hit the steamship, and caused the load to shift and the lighter to dump a part of the ore.”\** (Italics ours.)

The Circuit Court of Appeals, in holding the stevedoring company liable for the loss, said:

“Indeed, the fact that the stevedores did not contract to trim seems to us in no way to relieve the latter from liability. They undertook to discharge the cargo, and were bound to do this in a prudent manner. If it became unsafe to load the barge without trimming, as proved to be the fact, it was the plain duty of the stevedores to stop work and call upon the steamship to trim. Instead of doing this, they continued to pile the ore on the deck of the lighter, without seeing that it was spread by some one, until the center of gravity of the lighter became so high that she dumped her load. \* \* \* If the stevedores had ceased loading and called for trimming and secured assistance, the accident would not have happened. Their continuance in loading when danger was imminent was the proximate cause of the damage, and they only are liable in tort. It was the dumping of the last buckets of ore on the lighter that caused the injury.”

\*The testimony of Messick is to be compared:

“A. Yes, cone ‘1’; cone ‘1’ starts to slide and I did not notice that at first. Then I see him coming down stronger and I keep loading more and more over on these two points here trying to bring it out.

Q. Those two points— A. ‘A’ and ‘B’, trying to bring this up here; I think I am a little bit off keel and I am trying to bring her to an even keel; but she has gone down here so far that the top of these cones begin to slide there to the outside rail here, and the boat is taking quite a list. I think it was at 3:50 or about 3:50 or 4 o’clock he says, ‘That is enough’.

Q. Who says that? A. The mate.” (Messick, 233.)



## VII.

## CONCLUSION.

It can be seen that the present case is one of extreme importance for those who, under demise charters, charter lighters, tugs or other vessels on this coast. The law has been regarded as settled, that one who chartered a vessel in good condition and returned it in bad condition was obligated to show the cause of the loss and that the negligence of the charterers did not contribute to it. Any other position, if taken by the Courts, would be a direct invitation to carelessness by charterers. If the burden of proving cause of loss and negligence is on the owners in such cases, the owners will generally have small chance of proving their cases. The obvious reason is that in nearly all instances where a lighter or vessel is destroyed while in the possession of the charterers the only witnesses who know what actually happened are the employees of the defendants; and if there is negligence in the handling of a lighter it is the negligence of these very employees of the charterers. For an owner, before he can recover, to be compelled to secure evidence against their employer from the employer's witnesses (who, if they admit that they were negligent, are apt to be discharged), is to place a practically impossible task on the vessel owner. Occasionally, in a case of palpable negligence, evidence of such negligence can be obtained from the charterers' employees who have left his employ. Such cases are, naturally, very rare. We do not believe that the Circuit Court of

Appeals desires to make such a change in the law and to place upon vessel owners such a task when their vessels are lost while in the possession of demise charterers.

Granting, however, that the Circuit Court of Appeals should hold that hereafter in this circuit where a vessel is destroyed while in the possession of a demise charterer, the owner, in order to recover, must show: (1) how the accident happened; and (2) that the charterer caused the loss by its negligence; the case still is of great importance in the making of future charters. This is because of the evidence which was introduced.

*The uncontroverted evidence showed:*

1. That the lighter, chartered to the respondents to carry 400 short tons of ballast, was delivered into the possession of the respondents.

2. That the lighter at the time of delivery was inspected and found to be in first-class, seaworthy condition; that it had been kept by the owners in a state of repair; that within thirteen months of the time of the accident it had been used for the carriage of 500-ton loads of nitrate, worth up to \$50,000 in value per load. Not one word of testimony to the effect that the barge was unseaworthy was introduced by the respondents.

3. That after the delivery of the lighter, it was loaded by stevedores in charge of a gang boss named Messick.

4. That on the morning of the accident Messick told James Woodside, superintendent of the San Francisco Stevedoring Company, that the barge was fully loaded and that a new barge should be procured; that Jones, another employee of the San Francisco Stevedoring Company, heard Messick tell the same thing to the mate of the "Monongahela"; that Woodside told Messick to continue to load the barge; that when given such orders Messick testified that he would *load her until she sank*.

5. That loading was continued until about three o'clock Monday (the day she sank), when Messick noticed that she was listed at one of the outboard corners; that he had the lighter hauled ahead, and dumped on the diagonally opposite corner.

6. That the ballast was dumped on the barge until 3:50 P. M., Monday, and then rubbish of unknown weight began to be dumped.

7. That at about 4:10 Wilder, an employee of the Crowley Company, came on board the lighter, and in no uncertain terms told Messick to stop loading the lighter; that the lighter was then buckling.

8. That up to that time *no attempt had been made to trim* the ballast dumped on the barge.

9. That only then did Messick stop discharging and ordered his men up from the hold to trim the barge; that the ballast was slipping from the cones toward the outboard side of the barge; that two men went down on the barge, but it was then too late to trim her, and the men hurried back to the ship.

10. That when Captain Langren saw her from his tug at about 4:20, the barge was heavily overloaded and was buckling on the outboard corner.

11. That the barge was then tightly fastened to the "Monongahela", so that a tremendous strain was produced on the barge by the downward pressure of the ballast on the outboard side and by the corresponding upward pressure of the barge against the ship's side; that as the ballast slipped outboard the strain increased until the barge collapsed and broke all to pieces.\*

12. That although Messick was urged to cut the lines holding the lighter fast against the ship, which would have allowed her to swing out from the ship's side and dump her load, he did not do so, but simply allowed the strain to increase until the barge was broken; that he and the stevedores under him simply watched her from the rail from about 4:15 to about 4:40.

---

The only testimony introduced to controvert the admission of the man in charge of the work that he overloaded the barge and the above undisputed facts, was that given by two interested witnesses who testified that at about 3:30 or 3:40 P. M. the lighter appeared to be on an even keel. These same witnesses said nothing as to the lighter's freeboard, and did

\*David W. Dickie, a well-known naval architect and engineer, testified in detail as to how a barge of the type of the "No. 76", loaded as she was and fastened as she was, to the "Monongahela", would, on the slipping of her load to the outboard side, encounter great strain, resulting in her collapse (Dickie, 115, 119).



not deny that the lighter was overloaded and buckled. They confined themselves to saying that at about the times stated she appeared to be on an even keel.

The respondents' leading witness to prove that there were only 406 tons loaded on the barge based his testimony upon a displacement scale about the accuracy of which he admitted he knew nothing, and apparently drawn some twenty-seven years previous. His computations were based upon the assumption that certain ballast was loaded at Manila, upon the assumption that this ballast was accurately weighed at Manila, upon the assumption that there was no ballast in the ship when this ballast was loaded and upon the assumption that no additional ballast was taken. His computations are further based upon the accurate taking of the draft marks of the vessel at the time of the accident and upon an accurate application of these marks to the displacement scale. He clearly made an error of about twelve inches in taking the draft aft; apparently took the draft, not at the time of the accident, but several days later; and has admitted that he read the scale incorrectly.

The respondents carefully avoided calling either the mate of the "Monongahela", who was on the ship during the loading and who saw the lighter loaded from beginning to end, or any of the ship's crew or the stevedores actually working on the barge. The failure to call these witnesses, and particularly the mate, raises a strong presumption that their



evidence would have been unfavorable to the contentions of the respondents.

*The Steamer Southern Belle*, 18 How. 584; 15 Law Ed. 493, 495;

*Consolidated Coal Co. v. Knickerbocker Steam Towage Co.*, 200 Fed. 840.

If the libelant producing such uncontroverted testimony cannot recover in this case, it is hard to believe that an owner can ever recover against a demise charterer for loss of a vessel in the latter's possession. That both owners and demise charterers will, in the future, on the Pacific Coast, be largely guided by the decision of the Court in this case, is, we think, almost certain.

Dated, San Francisco,  
May 1, 1922.

Respectfully submitted,  
THACHER & WRIGHT,  
*Proctors for Appellant (Libelant).*

THOMAS A. THACHER,  
HARRISON A. JONES,  
*Of Counsel.*

No. 3846

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

CROWLEY LAUNCH AND TUGBOAT COMPANY  
(a corporation),

*Appellant,*

vs.

UNITED STATES SHIPPING BOARD EMERGENCY FLEET  
CORPORATION (a corporation), and the UNITED  
STATES OF AMERICA, as claimant of the American  
Ship "MONONGAHELA", her engines, tackle,  
apparel, etc.,

*Appellees.*

## BRIEF FOR APPELLEES.

MCCUTCHEEN, OLNEY, WILLARD, MANNON & GREENE,  
FARNHAM P. GRIFFITHS,

*Proctors for Appellees.*

FILED

MAY 13 1922

F. D. MONKTON,



## Topical Index

---

	Page
STATEMENT OF FACTS.....	3
DECISION OF THE LOWER COURT.....	6
I. The law of the case.....	11
(a) The respondents were bailees, not insurers of the lighter .....	11
(b) The respondents as bailees were not liable for injuries not caused by their negligence. They were not responsible for loss resulting from damages incident to the use of the bailed chattel	12
(c) The burden of proof.....	13
II. The evidence amply sustains the decision of the trial court .....	29
(a) The lighter was not overloaded.....	30
Amount loaded as computed by buckets (libel- ant's computation) .....	30
Amount loaded on the lighter according to the ship's displacement scale.....	33
(b) The lighter was properly loaded.....	38
(c) The libelant was responsible for the method by which the lighter was fastened to the ship..	49
(d) The respondents were not at fault in their fail- ure to cut the lines which held the lighter to the ship .....	53
CONCLUSION.....	54

## Table of Authorities Cited

---

	Pages
<i>Alder v. Grand Lumber Co.</i> , 81 Pac. 385.....	13
<i>Darby Candy Co. v. Hoffberger</i> , 73 At. 565.....	12
<i>Fireman's Fund Ins. Co. v. Schreiber</i> , 135 N. W. 507..	13
<i>Hastorf Contracting Co. v. Standard Oil</i> , 272 Fed. 884 .....	21, 56, 57
<i>Hildebrandt v. Flower Lighterage Co.</i> , 277 Fed. 436, 438 .....	21, 24, 56
<i>Killam Co. v. Monad Engineering Co.</i> , 216 Fed. 438....	12, 20
<i>Lake Michigan Car Ferry Trans. Co. v. Crosby</i> , 107 Fed. 725 .....	11
<i>The Lyra</i> , 255 Fed. 667.....	56
<i>Schoonmaker-Conners Co. v. Lambert Transp. Co.</i> , 268 Fed. 102 .....	19, 26
<i>Swenson &amp; Snare v. Trist Co.</i> , 160 Fed. 469.....	27
<i>Terry &amp; Tench Co. v. Merritt &amp; Chapman Co.</i> , 168 Fed. 533 .....	27
<i>Thayer Preliminary Treatise on Evidence</i> .....	14
<i>Wigmore on Evidence</i> .....	17



No. 3846

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

---

---

CROWLEY LAUNCH AND TUGBOAT COMPANY  
(a corporation),

*Appellant,*

vs.

UNITED STATES SHIPPING BOARD EMERGENCY FLEET  
CORPORATION (a corporation), and the UNITED  
STATES OF AMERICA, as claimant of the American  
Ship "MONONGAHELA", her engines, tackle,  
apparel, etc.,

*Appellees.*

---

## BRIEF FOR APPELLEES.

---

This was an action for the loss of a lighter orally chartered by the appellant to the appellees in December, 1919, for use in unloading 400 tons of sand ballast from the "Monongahela". The issue in the case is whether or not the damage to the lighter was caused by the charterers' (appellees') negligence. The libelant has appealed from the order of the District Court dismissing the libel. The parties will hereafter be referred to as libelant and respondents or as appellant and appellees.

We beg to state at the outset that we cannot concur in libelant's suggestion (brief for appellant, p. 11) that "the last word of law upon the effect of such a demise of a lighter is set out by the Circuit Court of Appeals for the Second Circuit in *Schoonmaker-Connors Co. v. Lambert Transportation Co.*, 262 Fed. 102 (July 3, 1920)". The "last word" we believe is in *Hildebrandt v. Flower Lighterage Co.*, 277 Fed. 438, where the Circuit Court of Appeals for the Second Circuit affirms Circuit Judge Mack's decision, rendered, as he says in the opening sentence, for the very purpose of giving the parties a full opportunity for review, and printed on the page of the 277th Federal immediately preceding the affirmance by the Circuit Court of Appeals. Judge Dooling's decision in the case at bar is, almost as if by prescience, squarely within the law as thus declared only last November and published in the Federal Advance Sheets of March 23rd, 1922 (277 Fed. 436 and 438); as it is also fully sustained by the decision of the United States Circuit Court of Appeals for the Second Circuit in *Hastorf Contracting Co. Inc. v. Standard Oil Co., of New Jersey*, 272 Fed. 884, rendered April 13, 1921, and thus some nine months after the decision of the same court in the *Schoonmaker* case *supra*. Nor for that matter do we believe that Judge Dooling's opinion and decision in the case at bar is in anywise at variance with the law as declared in the *Schoonmaker* case if the part of that case be read, which counsel for libelant has *not* quoted and which we think states the law as applied to the facts of the case at bar rather than the passage which counsel *has* quoted and which

we think either states the law for another state of facts or, as shown by the later above mentioned decisions of the same court, either states it erroneously or, for the facts of the case now before this court, too broadly.

These suggestions will be developed in our discussion of the law under heading II below. They are mentioned here because we wish to controvert, at the outset, the suggestion that the *Schoonmaker* case on which libelant in chief part builds its brief is the last word of law on the issues involved in this appeal, even for the Circuit in which it was rendered.

---

### Statement of Facts.

The American bark "Monongahela" was a United States Shipping Board vessel owned by the United States and operated for the Shipping Board by the firm of Struthers & Dixon of San Francisco. She came to San Francisco from Manila in ballast to take on cargo. On Monday, December 8, 1919, her operators orally chartered a lighter from the Crowley Launch and Tugboat Company to take 400 tons of ballast from the "Monongahela". Pursuant to the agreement for the hire of a lighter, the Crowley Company towed the "Crowley 76" over to the "Monongahela" Tuesday evening and made her fast to the ship. The "Crowley 76" was the next to the oldest barge in the Crowley Company's fleet. She was of wood, a flat frame-built barge, one hundred and twenty feet in length with a thirty-six foot beam and eight or nine feet deep. Empty

she drew a foot of water; loaded with 400 tons she drew five feet.

The discharge began on Friday morning and continued all that day, all Saturday, Sunday, Monday and up to about 3:30 Monday afternoon. The ballast was dug out of the lower hold and shoveled into buckets, which were raised and swung over the ship's side and the contents dumped on the lighter. A donkey-engine on the dock furnished the power for swinging and dumping the buckets. The sand was piled in cones, the first cone being piled a little forward of the center, and the work moved aft. To secure an even distribution of the load the lighter was shifted from time to time to build up other cones. By Monday afternoon there were four large cones and one smaller one. The stevedores were a gang of strike breakers employed because of the stevedore strike then pending in San Francisco, but they were in the employ of the San Francisco Stevedoring Company, a company which had had occasion to load barges with sand hundreds of times in San Francisco harbor, and the job was superintended by the superintendent of this company, James Woodside. The work of discharge and the handling of the lighter was scrutinized from time to time by representatives of the Crowley Company. On Saturday afternoon about 2 o'clock, the second day of loading, Mr. Wilder, the barge superintendent of the Crowley Company, was down on the dock and watched the loading of the barge for a time. James Sennott was the outside man of the Crowley Company. It was his business to watch the lighters and barges belonging to the



Crowley Company while they were in service at various docks and points around the harbor and to see that nothing went wrong with them. He was on the "Crowley No. 76" on Saturday and Sunday while loading was going on. He was on the barge on Saturday, and departed without making any criticism or suggestions to the stevedoring company or to the men in charge. Again on Sunday morning he observed the loading from the "Monongahela's" decks, saw what was being done, the methods of piling the ballast and trimming the barge, and apparently approved, for he departed without offering any suggestions or criticism. By this time the greater part of the loading was finished.

Up to four o'clock Monday afternoon the "Crowley No. 76" seemed to be in good condition. At that time the loading of the sand was completed and the stevedores were piling rubbish from the ship's hold on the top of the cones. At about four o'clock David Crowley of the Crowley Company, happened to be going along the waterfront and noticed, he said, that the barge was listing to starboard. He telephoned to John Wilder, the barge superintendent of the Crowley Company that the lighter needed to be straightened. Wilder arrived about 4:10 and on going into the hold found that the seams had opened up on the starboard side and that the water was coming in through her seams. The lighter was equipped with hand-pumps but Wilder telephoned for a big pump, a 4-inch centrifugal pump, as the most effective means of relieving the situation. Before the pump was put into use and without attempt



being made to use the hand-pumps, the barge capsized, the sand slipping outward away from the ship, and the barge turning bottomside up against the "Monongahela". This was about 4:40. The lighter was a total loss.

The libel filed against the ship set forth the delivery of the barge in good order and condition and the failure to redeliver her in that condition and alleged that her loss was due to the negligence, acts, omissions and defaults of the respondents. The answer denied that the loss was due in anyway to fault or neglect on the part of the respondents and set forth the unfitness of the lighter for the particular purpose for which she was chartered, namely, the carriage of 400 tons of sand ballast from the "Monongahela", and alleged that the loss was due solely to the perils necessarily incident to the service for which the lighter was hired.

---

### **The Decision of the District Court.**

The witnesses for the most part testified in open court and the case was submitted on briefs. The applicable rules of law were drawn to the Court's attention in the briefs and the authorities fully cited. The Court's opinion is brief and is concerned only with the facts of the case. It is as follows:

"It is not established that more sand was loaded on the barge 76 than she was chartered to carry, and the method of loading was not improper. It is just as likely that the barge being old, made

more water than usual, and that this was the cause of her loss.

The libel will therefore be dismissed." (Apostles, p. 292.)

A longer opinion would perhaps have shown more elaborately the working of the court's mind, but it is clear from the opinion as it is that the court was concerned only with questions of fact, the law being clear, and that upon the issues of fact before it the court held with the respondents. The court found that it was not established that the barge was overloaded and found that she was properly loaded. If she was not overloaded and if she was properly loaded the unescapable inference is that the barge was not suitable for the service for which she was hired. For damage due to such a cause the respondents were not liable under well established rules of law.

Libellant in its brief has referred to a circumstance outside the record (brief page 10). It is there pointed out that the court made no findings in addition to the opinion, and it is said

"the respondents represented a form of decree to the court in which the court was to find that the barge was not overloaded and that it was properly loaded and that the loss was caused by the unseaworthiness of the barge. This decree the court refused to sign and left the grounds of its decision as stated in the opinion."

Lest this court misapprehend the situation, we shall complete the libellant's out-of-the-record reference. We presented to the court for signature a form of decree containing formal findings of fact resembling some-

what findings of fact in law and in state practice. Thereupon libelants presented a form of decree with a memorandum reading as follows:

“The decree proposed by the respondents reads in part:

‘and the court having filed its opinion herein holding and deciding that the loss of the barge referred to in said libel was due solely to her unfit condition for the service for which she was hired by claimant and respondents and that said loss of said barge was not in any respect due to any fault, neglect, act or omission of said claimant and respondents, and ordering that the libel be dismissed.’

This description of the opinion is inaccurate. The only opinion rendered by the court in this case reads:

‘It is not established that more sand was loaded on the barge 76 than she was chartered to carry, and the method of loading was not improper. It is just as likely that the barge, being old, made more water than usual, and that this was the cause of her loss. The libel will therefore be dismissed.’

It is, of course, unnecessary to describe the opinion in the decree, and the decree could properly read: ‘and the court having filed its opinion herein and having ordered that the libel be dismissed.’

If, however, the opinion is described in the decree, obviously the description should be correct. In case the court describes the opinion in the decree, we suggest the words:

‘and the court having filed its opinion herein, holding and deciding that it was not established that more sand was loaded on the Barge No. 76 than she was chartered to carry, and that the method of loading was not improper, and deciding that it was just as likely that the barge, being old, made more water

than usual, and that this was the cause of her loss, and ordering that the libel be therefore dismissed.'

This description of the opinion is practically in its own words, and hence correct."

On receipt of the foregoing we presented the following memorandum:

"It has been our view that findings should not go into admiralty decrees. That is not the practice elsewhere. In recent years, however, findings have been embodied in admiralty decrees by other proctors here and we have sometimes wondered whether we ought not also to propose findings if that practice is to be approved here at all. There were elaborate findings, for example, in the 'Santa Rosa' case and brief findings in the 'Aggie' case.

If the court is willing to entertain proposals of findings, we should like to have it consider those included in the decree we submitted in this case, which meet the issues as presented in the pleadings. If not (and we are frank to say that we should prefer to have the court follow the practice elsewhere prevailing of not embodying findings in admiralty decrees), we are content that the decree proposed by libelant should be signed.

It is probably true that the findings should in any case have been embodied *as such* in the decree we proposed rather than as a description of the opinion. The question is one of form and the enclosed draft of decree meets libelant's criticism.

We repeat, however, that if the court should be disposed to adopt as the general rule the practice of making no findings in admiralty decrees, we should prefer that; and in that event we should not, of course, ask findings here and the form of decree proposed by libelant should be signed."

These were the circumstances under which the decree proposed by libelant *without* findings was signed and



under which there occurred the so-called "refusal to sign" the decree *with* findings which we had originally proposed.

The District Judge saw and heard most of the witnesses in open court. Of the twenty-six witnesses who testified, five testified by deposition, one testified both by deposition and in court, and the remaining twenty testified in open court. There was no particular issue in the case covered solely by deposition so that as to such issue the Court of Appeals could weigh the evidence as well as the trial court. There was *viva voce* testimony as to the amount of ballast loaded on the barge as well as the testimony taken by deposition; and the same is true as to the issue whether the barge was properly loaded.

The evidence was sharply in conflict upon the question whether or not the loss was caused by the respondents' (appellees') negligence. The Court believed and accepted the respondents' theory of the case. It is superfluous for us to lengthen this brief by reference to the innumerable cases applying the rule that the decision of a trial court upon questions of fact based upon conflicting testimony and involving the credibility of witnesses examined in the presence of the trial court is entitled to great respect and will not be reversed by the Court of Appeals unless manifestly contrary to the evidence.

We shall consider, first, the principles of law applicable to the case, and, secondly, the evidence upon which the trial court based its decision in dismissing the libel.



## I.

## THE LAW OF THE CASE.

This appeal is primarily from the trial court's decision upon the facts. It does not involve a mistake of law by the trial court, for there was no mistake; or disregard of the law owing to counsel's failure to draw the court's attention to the applicable principles. The case was elaborately briefed on both sides. Nor does the case involve a refusal of the court to apply the law, for there was no refusal. Libelant has argued as the chief ground for reversing the case an alleged mistake of law by the trial court as to the burden of proof resting upon the parties. We can show we believe that the Court applied a rule upon the burden of proof strictly in accord with the authorities and with the authorities from the very circuit which libelant invokes to support its contentions.

**(a) The respondents were bailees, not insurers of the lighter.**

The relation between the owner and the charterer of the "Crowley 76" was that of bailor and bailee, and in the absence of express contract there was no obligation on the charterer to return the lighter in the same condition as when received. Speaking of the liability of the charterer as a bailee, the court said in

*Lake Michigan Car Ferry Trans. Co. v. Crosby*,  
107 Fed. 723:

"Under the general rule of bailments, the bailee is not liable for loss without his fault; and no sound reason appears for excepting a charter party from such rule unless the liability as insurer is

based on a provision stronger than the mere covenant for a return of the property at the end of the term a covenant which is clearly implied without expression."

And the same rule was announced in

*Killam & Co. v. Monad Engineering Co.*, 216 Fed. 438:

"No more is now necessary than to state the principles by which the court has been guided. One is that in contracts of this kind the owner of the boat warrants her to be seaworthy and fit for the use to which she is intended to be put. Another is the general principle that a bailee for hire is not responsible for loss or damage, except such as may be brought about through his fault or by his negligence. This general principle is applicable to contracts for the hire or demise of vessels."

- (b) The respondents, as bailees were not liable for injuries not caused by their negligence. They were not responsible for loss resulting from damages incident to the use of the bailed chattel.**

As a bailee of the "Crowley 76" the respondents were liable only for negligence. They were not responsible for losses resulting from accident, from unseaworthiness, from dangers incident to the use of the lighter or for the unfitness of the lighter for the work for which she was chartered.

*Killam & Co. v. Monad Engineering Co.*, supra.

*Darby Candy Co. v. Hoffberger*, 73 Atl. 565 (Md.).

The court speaking of the relation of bailor and bailee said:

"In all of these cases the rule is distinctly established that the onus of proving want of reasonable

and proper care is on the bailor and that the bailee is not liable for an accidental injury not caused by negligence. And this is so because bailees for hire are not insurers of the bailed property."

*Fireman's Fund Ins. Co. v. Schreiber*, 135 N. W. 507:

"A contract of bailment, in the absence of special situations to the contrary, involves, by necessary inference, an understanding that the bailee may use the usual means of executing the agreement." (Headnote No. 3.)

*Alder v. Grand Lumber Co.*, 81 Pac. 385 (Ore.):

"When the plaintiff hired these animals to the defendant for logging purposes, he of course assumed all the ordinary risks that are incident to such employment; and if they were killed or injured without the fault or negligence of the defendant or its agents or servants plaintiff cannot recover \* \* \*."

That these well settled principles of law are applicable will not, we think, be questioned in this case. A third principle resulting from the first two is equally clear—but as to this we think the libelant is urging upon the court an erroneous construction of the rule.

### (c) The burden of proof.

Libelant seriously urges that delivery of the barge in good condition to the charterer and return in bad condition makes a *prima facie* case for the owner such that the charterer is bound to prove the exact cause of the loss of the lighter; and that, having proved such cause of loss, the charterer is then bound to proceed further and show that it did not come about through his negligence.

This rule is nothing more nor less than the rule applicable to an insurer. Wherein does it differ from the rule governing the liability of a common carrier? Delivery in good condition and return in bad condition, says libellant, throws the burden on the charterer (carrier) to explain the cause and to negative negligence on his part causing the loss; failing to show the cause of the loss, the charterer (carrier) is liable. Is there any difference between this liability and that of a common carrier who is an insurer? And yet we start out with the rule stated and approved by all the authorities that the bailee is *not* an insurer and therefore is *not* under an insurer's liability.

We think that the manifest contradiction between the first rule stated above and the rule regarding the burden of proof for which the libellant is contending comes about through a misuse, or at any rate loose use, of the term "burden of proof" often indulged in by courts and lawyers. The duty of going forward with the evidence is one thing, and the burden of proof, in the true sense of the word, is another. Strictly speaking, the burden of proof never shifts—it is always on the plaintiff—whereas the duty of going forward with the evidence frequently shifts from one party to the other as the case progresses. The distinction has been brilliantly discussed and explained by the late James Bradley Thayer in his *Preliminary Treatise on Evidence*, p. 355 and following.

"In legal discussion", says Thayer, "this phrase 'the burden of proof' is used in several ways. It marks, (1) The peculiar duty of him who has the risk of any given proposition on which parties are



at issue,—who will lose the case if he does not make this proposition out, when all has been said and done. In saying the ‘peculiar duty’, I mean to discriminate this duty from another one, called by the same name, which this party shares with his adversary. (2) It stands for the duty last referred to, when discriminated from the other one; that is to say, the duty of going forward in argument or in producing evidence; whether at the beginning of a case or at any later moment throughout the trial or the discussion. (3) There is an indiscriminate use of the phrase, perhaps more common than either of the other two, in which it may mean either or both of the others.”

\* \* \*

Pointing out the difference between the duty resting on the plaintiff and the defendant, Thayer goes on to say:

“In general, he who seeks to move a court in his favor, whether as an original plaintiff whose facts are merely denied, or as a defendant, who in admitting his adversary’s contention and setting up an affirmative defense, takes the role of *actor* (*reus excipiendo fit actor*), must satisfy the court of the truth and adequacy of the grounds of his claim, both in point of fact and law. But he, in every case, who is the true *reus* or defendant holds, of course, a very different place in the procedure. He simply awaits the action of his adversary, and it is enough if he repel him. He has no duty of satisfying the court; it may be doubtful, indeed extremely doubtful, whether he be not legally in the wrong and his adversary legally in the right; indeed he may probably be in the wrong, and yet he may gain and his adversary lose, simply because the inertia of the court has not been overcome; because the actor has not carried his case beyond an equilibrium of proof, or beyond all reasonable doubt.” \* \* \*



Then he proceeds to show that in the true sense of the word the burden of proof is always with the plaintiff.

“Whatever the standard be, it is always the *actor* and never the *reus* who has to bring his proof to the required height; for, truly speaking, it is only the *actor* that has the duty of proving at all. Whoever has that duty does not make out a *prima facie* case till he comes up to the requirement, as regards quantity of evidence or force of conviction, which applies to his contention; and, of course, he has not, at the end of the debate, accomplished his task unless he has held good his case, and held it at the legal height, as against all counter proof. This duty, in the nature of things, here as well as at Rome, cannot shift; it is always the duty of one party, and never of the other.”

The meaning of the term “shifting of burden of proof” he explains thus:

“But as the *actor*, if he would win, must begin by making out a case, and must end by keeping it good, so the *reus*, if he would not lose, must bestir himself when his adversary has once made out his case, and must repel it. And then, again, the *actor* may move and restore his case, and so on. This shifting of the duty of going forward with argument or evidence may go on through the trial. Of course, as has been said already, the thing that thus shifts and changes is not the peculiar duty of each party—for that remains peculiar; i. e., the duty, on the one hand, of making out and holding good a case which will move the court, and on the other, the purely negative duty of preventing this. It is the common and interchangeable duty of going forward with argument or evidence, whenever your case requires it.”

That there is ambiguity in the use of this term is only too plain. Thayer says:

“There is much ambiguity in what is said of the ‘shifting’ of the burden of proof. As to this it is vital to keep quite apart the considerations applicable to pleading, and those belonging to evidence. We see that the burden of going forward with evidence may shift often from side to side; while the duty of establishing his proposition is always with the *actor*, and never shifts. As we have only one phrase for two ideas belonging to two different subjects, we say, as it happens, that the burden of proof does, and does not shift.”

Wigmore, in analyzing the first meaning of “burden of proof” uses the phrase “risk of non-persuasion”.

*Wigmore on Evidence*, Sec. 2485:

“*Burden of Proof; Risk of Non-persuasion.* Whenever A and B are at issue upon any subject of controversy (not necessarily legal), and M is to take action between them, and their desire is, hence, respectively to persuade M as to their contention, it is clear that the situation of the two, as regards its advantages and risks, will be very different. Suppose that A has property in which he would like to have M invest money, and that B is opposed to having M invest money; M will invest in A’s property if he can learn that it is a profitable object, and not otherwise. Here it is seen that the advantage is with B, and the disadvantage with A; for unless A succeeds in persuading M up to the point of action, A will fail and B will remain victorious; the burden of proof, or, in other words, the risk of non-persuasion, is upon A. \* \* \*

“The risk of non-persuasion, therefore, i. e., the risk of M’s non-action because of doubt, may properly be said to be upon A. This is the situation common to all cases of attempted persuasion, whether in the market, the home, or the forum.”

With these clarifying distinctions one may helpfully point the discussion of the case at bar.

The libelant had the burden of proving its right to recover damages from the respondents; that is to say, it was for it to prove the negligence of the respondents which caused the loss of the barge, and upon it was the risk of non-persuasion. If and as libelant proved the good condition of the "Crowley 76" and its delivery to the respondents in such condition and the loss of the lighter while in the respondents' possession it made a prima facie case and threw upon the respondents the duty of going forward with the evidence. It was for the respondents then to offer testimony regarding the handling and the use of the barge while in its possession.

The lighter was chartered to carry a certain quantity of sand ballast. *Conceivably* a greater quantity might have been loaded, and *conceivably* the sand might have been improperly loaded. To show the quantity of ballast loaded and the manner of loading it on the barge was the duty of respondents in refuting such prima facie case as was made out by the libelant. The record shows that these were the chief issues in the case. Other matters, for instance the method of mooring the lighter to the bark were also considered. Upon charges of negligence in these various respects libelant as well as respondents offered testimony.

When all the evidence was in, what was the situation? The evidence offered by the respondents that the lighter was not overloaded and was properly loaded was believed and accepted by the trial court, and the court drew the inference that the loss was probably

the result of some leak in the barge due to an inherent cause.

Nevertheless, libelant protests that the respondents should have been held liable for the reason that they have not shown to a certainty the exact cause of the loss. Where, in the true sense, was the burden of proof? Libelant urges upon this court that the burden was upon the respondents to show the exact cause of the loss of the lighter, and in default of showing that cause to pay its value to the libelant. This would dispense entirely with Thayer's "peculiar duty of him who has the risk of any given proposition", and would be absolutely at variance with the authorities hereinafter cited on the law applicable to charterers as bailees.

As we said at the outset, libelant cites in support of its contention a decision of the Circuit Court of Appeals of the Second Circuit, as "the last word of law" upon the subject:

*Schoonmaker-Conners Co. v. Lambert Transportation Co.*, 268 Fed. 102 (July 3, 1920).

In the first place it is to be observed that the quoted passage (appellant's brief p. 12) is pure dictum, for it was declared by Judge Rogers in a passing reference to an admitted and non-contested liability, not on any issue.\*

\* The Schoonmaker case was one in which a wooden scow was chartered to the respondent and was returned with her decks and sides eaten by a powerful acid. The evidence showed, practically without contradiction, that a sub-charterer had placed twelve hundred drums of caustic soda on the scow's deck and left it uncovered for fifty days, exposed to rain and snow. The acid leaked from the drums and corroded the decks of the barge. It also appeared that the sub-charterer's attention was very early called to the dangerous character of the cargo, and the risk of serious damage to the boat unless the acid was covered. This is a case, therefore, where a known cause of damage was shown to have come about through gross negligence on the part of a sub-bailee.



In the second place, even as dictum, it was stated only as the law applicable where

“the charter party contained a covenant wherein it was agreed that the scow was to be returned in like condition as on delivery, reasonable wear and tear excepted”.

And in the third place Judge Rogers stated expressly in a paragraph on the same page with that quoted by counsel for libelant that

“it is settled law that, where a charter party contains no covenant for the return of a vessel in good order and condition, there is no liability for injury to the vessel without proof of negligence” (268 Fed. page 104).

There was no such covenant in the case at bar, so counsel cites only the rule as declared for the case of a charter party where the covenant is express, and then discarding the part of the *Schoonmaker* case which declares the rule where the covenant is not express, resorts to an earlier case (*Charles Killam & Co. v. Monad Engineering Co.*, 216 Fed. 438) for a dictum (and it is only dictum, for in that case the covenant *was* express) that the covenant if not expressed is nevertheless implied. If the *Schoonmaker* case is to be taken as the law and the “last word of law” on the subject counsel ought at least to follow it through.

We cannot believe that, even for the case of an express covenant to return in good order and condition, Judge Rogers intended in the passage counsel quoted, by libelant, to impose the obligations of an insurer on the bailee; and we submit that the dictum, even as dic-



tum, is too broad if construed literally to that extreme and as literally imposing liability on the bailee of a barge to pay for her loss if he cannot show the exact cause of the loss, and that it was not his negligence. That Judge Rogers certainly intended no such construction of the law for bailment of barges generally, and for a case like that at bar, is conclusively shown, we think, by the fact that he participated in the affirmance by the Circuit Court of Appeals for the Second Circuit (277 Fed. 438) of Judge Mack's opinion in *Hildebrandt v. Flower Lighterage Co.* (277 Fed. 436). And that the other two judges who sat in the *Schoonmaker* case (Judges Ward and Hough) have not so construed the law, is shown by the fact that they both participated in the opinion in *Hastorf Contracting Co. v. Standard Oil Co.*, 272 Fed. 884, Judge Hough indeed writing the opinion.

That opinion was rendered April 13, 1921. The facts bear a strong resemblance to the case at bar. It appeared that a wooden scow was chartered to receive a cargo of pyrites from the steamer "Werribee". Loading continued during the greater part of two days.

In the afternoon of the second day the scow began to leak and to settle to port. Pumping was unavailing and the scow capsized, dumping her cargo and receiving serious injuries. The issue in the case was whether the barge was properly loaded, the fact that she was not overloaded being conclusively proven. The case was tried in open court, about twenty witnesses were examined, and the trial court dismissed the libel without rendering an opinion. Passing over the issue in the

case at bar as to the overloading of the lighter, we ask the observation of the court to the facts in the *Hastorf* case and the facts in the case at bar in juxtaposition:

#### HASTORF CASE.

1. An unexplained leak followed by a list and capsizing;
2. A charge of negligence in the loading of a vessel by the charterer;
3. Conflicting evidence offered in open court upon this issue;
4. The issue as to the propriety of the loading resolved in favor of the respondent;
5. The court resorted to the inference that the scow had leaked from inherent defects.

#### CASE AT BAR.

1. An unexplained leak followed by a list and capsizing;
2. A charge of negligence in the loading of a vessel by the charterer;
3. Conflicting evidence offered in open court upon this issue;
4. The issue as to the propriety of the loading resolved in favor of the respondent;
5. The court resorted to the inference that the scow had leaked from inherent defects.

We quote pertinent passages from the court's opinion (page 885):

"The record discloses no debatable proposition of law; it being admitted that the unexplained leaking or the sudden capsizing of any vessel in quiet waters is evidence from which unseaworthiness may be inferred. Equally is it admitted that a good deck scow may be so loaded with such a cargo as pyrites as to cause strain and consequent leaking, and furthermore it is well known that when any laden deck scow leaks dangerously she is, owing to the height of her center of gravity, very likely to capsize." \* \* \*

"This method of loading was usual and proper, and under the evidence would not cause damage to any vessel reasonably fit for such deck cargo as pyrites.

*Libelant's scow, although some 20 years old, is shown to have been kept in good condition, and had received a reasonable overhaul only a few months before this accident."* (This is the showing on which libelant much relies in the case at bar.) "*Yet it is well known that wooden vessels do at times begin to leak with a suddenness and violence quite difficult of explanation. We have often commented upon the importance of seeing and hearing witnesses, and pointed out our unwillingness to disturb a finding of fact made by the judge, who must have weighed and been moved by the apparent credibility of the men he listened to. In this case, libelant's witnesses describe a style of loading not only improper, but foolish and unnecessary. Their testimony was rejected below, as we would have rejected it, had the testimony been taken by deposition and we had been the first to examine it judicially. It is far more difficult to believe the method of loading asserted by libelant than it is to believe the inference of a sudden leak, which is the only explanation consistent with respondent's testimony."* (Italics ours.)

The decision in this case cannot be reconciled with libelant's contention in our case that the charterer is bound to show the precise cause of the loss without resorting to inference. Had that been the true rule, the court in *Hastorf Contracting Co. v. Standard Oil Co.*, supra, must inevitably have held that the respondent had failed in sustaining its burden of proof and was, therefore, liable. The action of the trial court, however, in dismissing the libel, and the affirmance of its decree by the Circuit Court of Appeals indicate that the court did not place the charterer under the burden of proof for which appellant in the case at bar contends.

But the Circuit Court of Appeals of the Second Circuit, has gone even further than the *Hastorf* case in clarifying the law. The case of

*Hildebrandt v. Flower Lighterage Co.*, 277 Fed. 436; affirmed 277 Fed. 438 (Nov. 7, 1921),

is, as we have said, truly the last word on the subject. In that case a lighter under charter was returned to her owner in a damaged condition. A tug which had assisted in shifting the lighter was brought in as third party respondent. The charterer (the bailee of the barge) offered evidence to negative charges of negligence in handling the lighter and in stowing the cargo, but he was unable to show the exact cause of damage. The libellant urged that the *prima facie* case in his behalf could be met by the respondent only by showing how the accident happened—exactly the contention which is made in the case at bar.

In dismissing the libel, Judge Mack of the Circuit Court of Appeals of the Seventh Circuit (who was then sitting in the District Court of the Southern District of New York), explained the applicable rules upon the burden of proof. He first stated the duty of the bailee to exercise ordinary care.

“Now, as between the libellant and the respondent, the bailee is liable for the exercise of ordinary care; it responds in damages, if it fails to exercise ordinary care in the protection of the property. It is held that in a bailment of this kind the fact that the accident happens, that the damage is done while the boat is in the bailee’s possession, that the bailee is not able to return it in good condition subject to ordinary wear and tear, establishes a *prima facie* case of fault.” \* \* \*



Continuing, he squarely denied libelant's contention as to the burden of proof:

"In other words, it is up to the bailee to rebut the prima facie case; that is, to explain the situation. *I cannot agree with counsel that the prima facie case can be met only by showing how the accident happened. In my judgment, the true principle of law is that the burden of proof is on the libelant to establish negligence; that that burden is prima facie met in the case of a demise by showing the failure to return in good condition, subject to ordinary wear and tear. That puts upon the defendant the burden of going forward with evidence to show a lack of negligence on its part. But, when all the evidence is in, the court must weigh the situation and say: Was the respondent guilty of negligence or not?*" (Italics ours.)

Then, considering the proof offered in the case, he said:

"Now, what is shown in this case? It is shown that the defendant acted properly, so far as it is concerned, in the handling of the boat, in the loading of the cargo on the boat. It did nothing, so far as the evidence shows, that can be called negligence, and everything that it did do is shown. It is immaterial whether, if the master had been present, the accident would not have happened, because the respondent is not liable for the master's being absent. In so far as that would have any bearing on the case, it would be a responsibility of the libelant. I am assuming, because I believe that the evidence sustains it, that the boat was in seaworthy condition when it was handed over to the respondent. It follows, therefore, that the damage occurred after it was handed over to the respondent. That reduces the inquiry to this: Was the respondent guilty of negligence, by which that damage occurred? As I say, if there were no proof at all, except the handing over, for the failure to return



they would be liable; *when there is proof of just what was done, even though the cause of the particular damage is not shown, the burden of showing negligence remains on the libelant.*

In my judgment, that burden has not been met; there has been no showing of negligence." (Italics ours.)

The significant thing about the opinion of Judge Mack (who came from the Seventh Circuit) is that it unquestionably expressed the views of the Court of Appeals for the Second Circuit. The opinion of Judge Mack is dated June 19, 1919. The judgment was affirmed on November 7, 1921, by the Circuit Court of Appeals of the Second Circuit, without opinion, the opinion of the lower court and the decree of affirmance being printed together (277 Fed. 436 and 438). It is most significant that Judge Rogers, who wrote the opinion in the *Schoonmaker* case (on which libelant here practically stakes its case), is the judge who, with Judges Manton and Mayer, adopts the opinion of Judge Mack in the *Hildebrandt* case and adopts it in November, 1921, a year and a half after the *Schoonmaker* case, which was decided in June, 1920. The publication of the trial court's opinion with the decree of affirmance, after the lapse of more than two years, manifestly indicates that the Circuit Court of Appeals approved and adopted the reasoning of Judge Mack in the lower court. Obviously, the lower court's opinion so clearly expressed the views of the upper court that a written opinion by the latter court was found unnecessary. No other conclusion is tenable.

As Judge Rogers, who wrote the opinion in the *Schoonmaker* case, sat in the *Hildebrandt* case, it is not thinkable that the court could have overlooked the *Schoonmaker* case on which libelant chiefly grounds its present appeal. The owner of the lighter in the *Hildebrandt* case presented in the Circuit Court of Appeals the very point urged by the appellant in the case at bar. To this point the lighter owner's brief\* says:

"The liability of the bailee as laid down in the case of *Terry & Tench Co. v. Merritt & Chapman Derrick & Wrecking Co.*, 168 Fed. 533, is clear. Circuit Judge Noyes held the charterer was under an obligation to show, first, how the injury occurred, and second, that it was free from negligence. It may be true that this may work a hardship in some cases upon the charterer, because although he may show that he did not cause the damage, yet he is liable because he is unable to say just how the accident occurred."

It is to be noted, too, that the case relied on in the foregoing passage is *Terry & Tench Co. v. Merritt & Chapman Derrick & Wrecking Co.*, 168 Fed. 533. The court will observe by reference to the opinion in the last cited case, that it in turn discusses the case of *Swenson v. Snare & Trist Co.*, 160 Fed. 469.

These two cases (the *Terry* case and the *Swenson* case just cited) are, with the *Schoonmaker* case, *supra*, the authorities on which appellant relies in this appeal on the point now under discussion. These authorities were all, as we have just shown, before the Circuit Court of Appeals for the Second Circuit, and the point urged on this appeal, with these authorities, was there

\*We have printed the entire brief as an appendix to this brief.

presented. That the point was also presented to Judge Mack and disallowed by him, in the trial of the *Hildebrandt* case is shown in the passages we have quoted above (and see the opinion in 277 Fed. at page 437, particularly).

We take it, therefore, that the approved rule of law in the case of a demise charter is that the burden of proof is primarily on the libelant to establish negligence; that that burden may be *prima facie* met, in the case of a demise, by showing a failure to return in good condition (ordinary wear and tear excepted); that the respondent is then under the duty of going forward with the evidence to show what happened; but that when all the evidence is in, the question for the court is whether it is persuaded that the respondent is guilty of negligence; and when the respondent offers persuasive proof showing his lack of negligence, even though the cause of the particular damage be not shown, the burden of showing negligence remains with the libelant.

Judge Dooling did not have the benefit of the opinion in the *Hildebrandt* case when he decided this case, for the *Hildebrandt* case was not reported until March 23, 1922, but it is apparent that his mind marched with Judge Mack's. He found that the "Crowley 76" was not overloaded and was properly loaded; the issue being whether or not the respondent was guilty of negligence and, the burden being on the libelant to prove negligence, he dismissed the libel, for he thought it just as likely that the loss was caused because the barge, being old, leaked. The rule stated by Judge Mack upon the

burden of proof resting upon parties is clearly that applied by Judge Dooling. In other words, he was not persuaded that the libelant was entitled to recover. The "risk of non-persuasion", using Wigmore's illuminating phrase, was with the libelant. Libelant having failed to meet this primary burden of proof, the court properly dismissed the libel.

This disposes, we think, of appellant's contention that the Court erred as to law applicable to the case. The only question remaining for consideration is whether the evidence supports the decision of the trial court.

---

## II.

### THE EVIDENCE AMPLY SUSTAINS THE DECISION OF THE TRIAL COURT.

We believe we have shown that no error of law enters into this case. The appeal is really from the Court's decision upon the facts. The question before this court is, therefore, whether there is sufficient evidence to support the findings of the trial court. Under the rule to which we have previously referred, the judgment should be affirmed unless it is manifestly contrary to the evidence. A review of the evidence will demonstrate, we venture to suggest, that the judgment so far from being manifestly, or indeed at all, contrary to the evidence, is in accord with it.

The specific charges of negligence against the respondents upon which evidence was offered and con-



sidered in the briefs in the trial court or on the appeal, are:

- (a) Overloading;
- (b) Improper loading, including failure to trim the barge;
- (c) Improper mooring of the barge to the "Monongahela" and (for the first time on the appeal);
- (d) Failure to avoid loss by cutting the lines which held the lighter to the bark.

The evidence on these points will be considered in the order indicated.

**(a) The lighter was not overloaded:**

The trial court found that it was not established that the lighter was overloaded. And the evidence shows that it was not.

The "Crowley 76" was chartered to carry 400 tons of sand ballast. In the nature of things it is impossible to say that the ballast was weighed ounce by ounce as it was taken from the "Monongahela". The owner and the charterer were both obliged to offer to the court methods of determining the weight of the ballast put on the lighter which were not based upon actual measurement of the ballast by the scales as it went into the lighter. The appellant's method was that of addition and multiplication; appellees' was by subtraction.

*Amount loaded as computed by buckets (libellant's computation).*

The appellant introduced testimony to the effect that 546 buckets, each weighing 2200.5 pounds, were put on the lighter (Messick, Dep. Apostles, pages 226-227).



According to this method of computation the sand on the lighter weighed 600.7 short tons. The accuracy of the total depends, of course, upon the accuracy of the multiplicand, as well as the multiplier. If the buckets did not run uniformly full, the total is bound to be incorrect. Messick, who was in charge of the loading of the buckets, testified that the buckets were loaded full (Apostles, pp. 241-242). Jones, one of the stevedores who worked in the hold, said "they were well filled, at least the ones *I* was working on were well filled all the time" (Apostles, page 58).

Captain Scott, who was port superintendent for Struthers & Dixon, the operators of the "Monongahela", contradicted this testimony. He watched the discharge of the ballast to the barge off and on a good many times a day during all the time the lighter was there. He testified as follows (Apostles, page 140):

"Q. Did you have occasion, in the course of your duties as port superintendent of Struthers & Dixon, to be in and about the 'Monongahela' during the discharge of ballast on to the barge?

A. Yes, sir.

Q. During all the time that she was discharging, off and on?

A. A good many times a day during all the time she was there.

Q. Did you observe the buckets as they came out of the hold of the barge? A. I did.

Q. What was their condition as to the amount of the ballast in the buckets?

A. When they first commenced to discharge the buckets were pretty well filled; later, as they took it out from the wings and back from the square of the hatch, a great many of them were only half full."

James Woodside, superintendent of the San Francisco Stevedoring Company, which loaded the barge, testified as follows (Apostles, page 168):

“Q. During the time that that ship was being discharged, you were there often, were you?

A. I was on the dock all the time.

Q. And on the ship?

A. And on the ship three or four times a day.

Q. Did you notice the buckets as they came out of the ship, with respect to the amount of sand in them?

A. Yes, I had to keep after the men all the time, they didn't fill the buckets.

Q. They did not run full?

A. No. From two-thirds to three-quarters.”

A donkey engine on the dock beside the “Monongahela” supplied the power by which the buckets were hoisted from the hold and their contents dumped on the lighter. It was operated by Marvin Brooks. He was better qualified than any of the witnesses to give an opinion as to the weight of the buckets. He testified that the buckets did not run uniformly full (Apostles, page 164):

“Q. What, if anything, do you know about the buckets being full or not full?

A. Some of the buckets were loaded full, I know from the way the engine pulled, and some were loaded not so full. When I would go to take an empty bucket out, without any sand in it at all, the engine would run fast and you could tell the way it was pulling.”

The respondents, however, did not depend merely on showing that the libelant's figures were based on faulty premises, but showed the amount of sand put on the

lighter by a method of computation on the reasonable accuracy of which the safety of life and property were dependent.

*The amount loaded on the lighter according to the ship's displacement scale.*

The "Monongahela" sailed from Manila to San Francisco in ballast. She carried 800 metric tons of sand ballast, equal to 1,763,200 pounds (Apostles, pages 134, 136, 176). As she was to sail from San Francisco with cargo, it was necessary to remove part of her ballast,, but her captain desired that at least 400 tons should be left in the ship, and the marine surveyor gave orders to this effect. This appears from the testimony of Captain Armstrong (the master of the "Monongahela"), Captain Scott (port superintendent of Struthers & Dixon, the operators of the ship) and Captain Mills, the marine surveyor. Captain Scott testified as follows:

"Q. Do you remember the discharge of sand ballast from the vessel 'Monongahela' on to the 'Crowley Barge No. 76'? A. Yes, sir.

Q. Did you arrange for the employment of that barge? A. I ordered the barge, yes, sir.

Q. What was the arrangement

A. I called up Crowley and ordered a barge to handle the sand ballast. There was nothing said about the price, they had regular schedule prices.

Q. What was the amount of sand ballast that you specified that you wished to unload?

A. 400 tons.

Q. What was your reason for desiring the removal of that much sand ballast?

A. The ship had 800 tons of ballast in her. Our surveyor—

Mr. THACHER. —May I ask that the witness be instructed to testify to what he knows, rather than

to what he was told? I think the statement as to how much ballast there was in the ship is purely hearsay.

Mr. GRIFFITHS. Q. Is this document from your office records, Mr. Scott?

A. Yes, that is from the office in Manila, where the ballast was purchased.

Q. And that is in your office files now, is it, here in your office? A. Yes, sir.

Q. Now, tell us what it is.

A. 800 metric tons sand ballast supplied and put on board the ship 'Monongahela'." (Apostles, pp. 134, 135.)

Captain Armstrong testified to the same effect:

"Q. From what port had she (the 'Monongahela') come? A. From Manila.

Q. Did you come with ballast from Manila?

A. Yes, sir.

Q. How much ballast did you take at Manila?

A. Eight hundred tons.

Q. How much ballast did you desire to have discharged here, or, rather, how much did you desire to have left in the vessel before sailing?

A. I aimed to have a little more than 400 tons in the vessel.

Q. Were those your orders to your operators?

A. Yes, sir." (Apostles, p. 157.)

Captain Mills' testimony was as follows:

"Q. Captain Mills, what is your business?

A. Marine surveyor.

Q. Here in San Francisco? A. Yes, sir.

Q. Were you the surveyor in the discharge of the ballast of the 'Monongahela' in December, 1919?

A. I was surveyor on the ship for the discharging of the cargo and the loading of the cargo.

Q. Did you make a surveyor's report?

A. I did.

Q. Is this a copy of the report that I show you here now? A. It is.



Q. Does that show the mean draft of the vessel upon completion of discharge of the ballast?

A. It does; it shows the draft at each end of the ship; the mean would be the division of the two.

Q. Did you have instructions as to how much ballast should be left in the vessel?

A. I did; not only did I have instructions, but I gave instructions.

Q. What were they?

A. Not less than 400 tons were to be left on board." (Apostles, pp. 173, 174.)

Appellant's counsel quarrels with this method of estimating the amount of ballast on board the "Monongahela". We submit that it is a check, the accuracy of which cannot be reasonably questioned. The testimony of the captain of the ship, who ordered the ballast in the amount needed, the testimony of the man who handled and paid the ship's disbursements, and the presence among the ship's accounts of a receipted bill for 800 tons of sand, are persuasive that this was the amount of ballast on the "Monongahela". It was put on board the "Monongahela" because it was necessary to her safety in sailing from Manila to San Francisco, long prior to litigation, and not for purposes connected with this suit.

Starting, then, with the "Monongahela's" ballast at 800 metric tons (equaling 1,769,200 pounds) the quantity taken off and placed on the "Crowley 76" is arrived at by computing the amount of ballast left on board the ship after the lighter was loaded according to the ship's displacement scale. The subtraction of the last amount from the first gives the amount loaded on the lighter.

Captain Mills, the ship's surveyor, shows the method of computation:

“Q. On the afternoon of December 15, toward the close of the discharge, did you calculate the ballast then left in the vessel? A. I did.

Q. With Mr. Scott?

A. Mr. Scott, and Captain Armstrong, and Mr. Miller—I won't be sure about Mr. Miller, but with Mr. Scott and Captain Armstrong.

Q. How did you make your calculations?

A. By the displacement scale on the ship.

Q. And does your survey report here show the ballast left in the vessel? A. It does.

Q. What does it show? A. 430 tons.

Q. Long tons?

A. Yes. The displacement scale is figured on long tons.

Q. You worked that out by the use of the displacement scale in reference to the draft, did you?

A. I did.

Q. Will you explain to the court your calculation? Have you a memorandum you can use and show the court how these calculations are made? Can you make the calculations here?

A. I made a memorandum.

Q. Have you got it with you?

A. I think I have, yes.

Q. This is something you have made up in the last few days by using the surveyor's report and the displacement scale? A. Yes, sir.

Q. Will you explain to the court how you arrived at the number of tons of ballast which were left in the vessel, or taken out, as the case may be—taken out, if you have it worked there?

A. The displacement scale would show that. This was taken from the displacement scale by her draft showing at that time that she had 475 long tons.

Q. Yes, I understand that, but I want you to go right through the calculation here.

A. Then, with the ship's stores and the dunnage that were left on board—the stores would in-

clude the provisions, and the ropes, and the sails, etc., and the dunnage, there was a large amount of dunnage on board I estimated about 50 tons, not to exceed 50 tons at the outside; that was a maximum; I usually make my figures on maximum amounts; 50 tons from that would leave 425 tons of ballast left on board the ship." (Apostles, pp. 174, 175.)

On cross-examination Captain Mills testified as follows:

"Q. You made the surveyor's report out, as I understand you, you made it out on December 22nd, the day it is dated? A. Yes, sir.

Q. This was the date on which you made up these various figures; when did you check the draft?

A. I took the draft when she was finally discharged, when all the ballast was taken out preparatory to loading.

Q. Was that around December 22?

A. That was prior to that.

Q. Prior to that?

A. Yes, it was four or five days prior to that.

Q. Do you know just when?

A. I think somewhere about the 15th or 16th; I have no notes on that.

Q. According to this, when she was ready to load she had 8 feet 8 inches forward and 11 feet 8 inches aft; that is correct, isn't it?

The COURT. 10 feet 2 inches.

A. 10 feet 2 inches was the mean draft.

MR. THACHER. Q. What was it aft?

A. 11 feet 8 inches aft, and 8 feet 8 inches forward; we trimmed the vessel 3 feet by the stern." (Apostles, pp. 178, 179.)

On the deposition taken after the trial, Captain Mills corrected his testimony to say that at a mean draft of 10 feet 2 inches the total amount of ballast and supplies on board the "Monongahela" would be 525 long tons

(Mills' Deposition, Apostles page 287). Captain Ludlow and Captain Smith, corroborating the testimony of Captain Mills, also testified that at a mean draft of 10 feet 2 inches the total amount of ballast and supplies on board the "Monongahela" would be 525 long tons (Apostles, page 273, page 279).

The amount of ballast placed on the lighter is thus computed as follows:\*

(Mean draft of vessel after discharge of ballast 10' 2".)

Ballast on board at Manila.....	800 metric tons=	1,763,200	pounds of ballast.
Supplies, stores, ballast, etc., left on board ship after ballast was put on lighter, according to ship's dis- placement scale (Mean draft 10' 2").....	525 long tons		
Supplies, stores dunnage.....	50 long tons		
<hr/>			
Ballast left on board.....	475 long tons	=	1,064,000
<hr/>			
Ballast put on lighter.....		699,200	pounds of ballast
			or
			349.6 short tons
			placed on lighter
			or
			312.1 long tons.

The original computation as given at the trial was as follows:

Ballast on board.....	800 metric tons=	1,763,200
Supplies, stores, ballast, etc., on board ship, after ballast was put on lighter.....	475 long tons	
Supplies, stores, dunnage.....	50 long tons	
<hr/>		
Ballast left on board.....	425 long tons	= 952,000
<hr/>		
		811,200
		or 362.6 long tons placed in lighter,
		or 405.6 short tons.



The estimate of the ship's stores at 50 tons was a conservative estimate by Captain Mills (Record, p. 175), and Captain Smith gave his opinion that this was a moderate estimate (Apostles, p. 280).

Libellant's counsel in their brief refer to this computation of the amount put on board the lighter as: "The Captain Mills' Theory" (brief, page 33).

Why this nomenclature! The amount of ballast put on the barge was an important issue in the case. The libellant and the respondents were both compelled to offer to the court some method of computing this amount, not based on the weighing of the ballast, ounce by ounce, as it went over the ship's side. Their method is the stevedore's tally of the number of buckets, multiplied by the estimated weight of each bucket. Ours is by subtracting from the amount of ballast on the "Monongahela" before the discharge began, the amount left after the discharge was completed. The difference is the amount that was placed on the lighter.

The data on which our computations were based was that on which the ship was being ballasted and thus her seaworthiness for a contemplated voyage tested. The safety of the men and property aboard her depended on the reasonable accuracy of these computations and as Judge Dooling remarked in reference to the displacement scale on which the calculations were based:

"This is the scale they were using, and on which they were sending this ship to sea. It was not made for the purposes of this case; it was made for the purposes of the ship. \* \* \* If they sent their

cargoes and their captain and their men to sea on this scale, it is at least valid enough to go into evidence here." (Apostles, p. 186.)

It would be just as proper (or improper, according to the point of view), to refer to appellant's computation as "Foreman Messick's Theory" as it is for appellant to denominate ours "The Captain Mills' Theory".

Libelant challenges the accuracy of respondents' figures as to the amount loaded, by pointing to certain enlargements of photographs made by the witness W. W. Swadley on the day after the "Crowley 76" overturned. The photographs made by Mr. Swadley, taken the day after discharge was completed, are offered as proof that the draft aft of the "Monongahela" after the ballast was discharged, was not 11' 8", but about 10' 8", and that therefore, in calculating the mean draft of the vessel Captain Mills made an error of six inches. The testimony shows that each inch in the mean draft represented about 25 tons deadweight on the vessel, and that such an error of six inches in calculating the mean draft would mean that there were 150 tons of ballast taken out of the vessel in excess of Captain Mills' calculations.

First of all appellant says that it is obviously impossible for deadweight capacity to be closely calculated by a man standing on the ship's deck looking down at her draft marks at the bow and stern exposed to the lap of the waves, and that this at best can only be a rough approximation. Appellant is we believe mis-

taken in the suggestion that Captain Mills stood on the *deck* to get the vessel's draft marks? On page 34 of their brief appellant says that Captain Mills testified that:

“By looking from the *dock* he saw the draft of the ship to be 8' 8" forward and 11' 8" aft.”

This was the fact. He did so testify (Apostles pp. 288, 289). Captain Mills got the ship's draft fore and aft from the dock, where Mr. Swadley, the photographer, got the photographs showing the draft. The lens of the human eye was therefore in just as favorable a position for estimating the draft as was the photographic lens on which appellant relies to overthrow Captain Mill's calculations.

To compute to a nicety the draft of a vessel as it is indicated by photographs is not easy. The lens photographs the picture at one instance of time. It cannot show the true size of the subject, nor can it give the variation of a moving object from instant to instant. First of all, the scale of the ship's marks needs explanation. The court will observe the height of the figures on the side of the vessel, and the marks indicating the draft. The height of each figure on the side of the vessel was 6" and the interval between the figures was 6" (Ludlow Dep. Apostles p. 274). The dark line in the pictures at the top of the Roman numeral “XI” is a wet line made on the ship's hull, which is made by the wash of the sea against the vessel. Whenever the waves are lapping the hull keeps

wet (Swadley Dep. Apostles pp. 264, 265). Mr. Swadley testified that the lapping of the water against the ship on the morning he took the picture, amounted to only 3", for it was an exceedingly calm smooth day (Apostles, p. 265). He testified that his lens would not photograph a numeral below the water line (Apostles p. 263).

If the two pictures that were offered for the trial court's scrutiny be observed it will be noted that in Exhibit "A" the figure XI is about half way out of the water; that in Exhibit "B" it is entirely out of the water, but with no space to spare; that is to say, the actual water line appears to have been exactly at the base of the figure. In each picture the dark streak or line of the water's wash against the ship is almost at the top of the numeral XI. As the water washed against the ship therefore, the figures indicating the draft of the vessel would have varied from 11' to 11' 3". Allowing for the mean of the wash against the vessel the draft of the vessel aft, if it is estimated according to the photographs, could not have been more than 11' 1" or 2". The draft of 10' 8" given in appellant's brief at page 37 is obviously an exaggeration. If the draft aft be taken to be 11' 1" or 2", then the mean draft would be about 9' 11", for the draft forward was 8' 8". As was explained by the witness, Captain Ludlow, each inch on the displacement scale represented 24 or 25 tons (Apostles, p. 274). At a mean draft of 9' 10½", the vessel's deadweight contents would be 465 tons (Ludlow Dep. Apostles, pp. 273, 274). The computation of the amount of



ballast taken off the ship and put on the lighter would then be made as follows:

800 metric tons

of ballast = 1,763,200 pounds

Total amount left

on board 465 tons

Supplies etc. 50 “

---

Ballast left

on board 415 “ = 929,600

---

833,600 pounds = 372.1 long tons,

or

416.5 short tons

put on

lighter.

Even if we were to take the photographs as representing correctly the draft aft of the ship at the time the ballast was unloaded, it is apparent that the lighter, if fit for the work, should, according to libelant's witnesses, have been able to carry the sand easily.

It may be fairly questioned, however, whether the computation just given is correct. It is accurate only upon the premise that the photographs represent accurately the draft as it was taken on the afternoon of December 15th by Captain Mills. Mr. Swadley's photographs were taken on the morning of December 16th, sixteen or eighteen hours later. If during the interval anything occurred to change the relation of the draft aft and forward towards each other, the draft aft

might show a difference on the photographs from its measurement the afternoon before, but without any change at all in the mean draft; that is to say, a draft aft of 11' 1" or 2" might indicate a lightening at the stern and an increasing of the draft forward, *the mean draft remaining the same.*

To sum up: The mean draft of the ship, after completion of discharge of the sand ballast, was estimated by her surveyor at 10' 2". This was a calculation made, before the injury to the lighter and not for the purposes of this suit. It was made to estimate the amount of ballast left on board the ship, which was necessary for the due safety of life and property. It was the draft on which the "Monongahela" was going to sea. None of the appellant's evidence and none of the arguments based thereon, have off-set or contradicted this—the mean draft of the vessel was 10' 2". We think, therefore, that the court should take the figure 10' 2" as the vessel's mean draft and upon this basis accept the calculation given on page 38 *supra*, showing the amount of ballast put on the lighter to have been 349.6 short tons, or 312.1 long tons.

**(b) The lighter was properly loaded.**

The method adopted in loading the "Crowley 76" was entirely proper.

The buckets went out from the ship's side on the yardarm or boom and were suspended so as to be amidships of the lighter. The sand was discharged at first just forward of the center of the lighter. The lighter was shifted from time to time, however, the

work moving aft, thus allowing an even distribution of the sand on the deck of the lighter. Four distinct cones were thus built up (Apostles, pp. 55, 161, 162, 226).

This method of loading was approved by men of long and successful experience in stevedoring. Captain Bennett, vice-president and manager of the California Stevedore & Ballast Company, approved it (Apostles, p. 149). So did Mr. Wieder, a superintendent in the employ of the Peterson Tugboat Company (Apostles, p. 172), and Mr. Hazeltine, president of the Pacific Stevedore & Ballast Company (Apostles, p. 159). So did libelant's witness Captain Langren (Apostles, pp. 200, 201). The witness David Crowley said positively that loading barges in cones was not the customary method, and was improper, and that loading them flat was the proper way (Apostles, p. 7)). But he was the only witness on behalf of either party who so testified. Another of libelant's witnesses, Wilder, the Superintendent of the Crowley Company, testified that loading in cones was a proper method, and in fact, in his opinion, the preferred method of loading (Apostles, p. 94).

This testimony would be conclusive as to the propriety of respondents' method of loading, quite apart from the testimony of libelant's witness, James Sennott. Mr. Sennott was the outside man of the Crowley Company. It was his work to keep an eye on the lighters and barges of the Crowley Company while they were in use at the different docks and points in the harbor, and to see that nothing went wrong with them. He went all over the "Crowley 76" on Saturday while she

was being loaded, was on her decks, went down into her hold, and went off without making any observations or criticisms or suggestions to those in charge of the loading (Apostles, pp. 97 and 98). He was on the barge again on Sunday, by which time the greater part of the discharging was done, and apparently approved of what he saw, for he went off without any fault finding (Apostles, pp. 98 and 99).

There is no evidence that the lighter was listing prior to Monday afternoon, the afternoon of the accident. One of the stevedores, the witness Jones, testified that on Monday morning the barge was on an uneven keel (Apostles, p. 55), but he later testified that when he helped to shift her at 12 o'clock she moved very freely and that at two o'clock, when she was shifted again she was on an even keel (Apostles, p. 67). Mr. Sennott, who was on the "Crowley 76" Sunday morning, testified that the barge was all right then; that there was nothing to complain of and that she was then in a safe condition (Apostles, pp. 98, 104, 105 and 107). Mr. Wilder himself watched the loading of the barge on Saturday afternoon for awhile and found no fault (Apostles, p. 83). Mr. Wieder, the superintendent of the Peterson Tugboat Company, testified that at nine o'clock on the morning of the 15th, Monday, the day of the accident, the barge was riding on an even keel (Apostles, p. 171). Captain Scott, Struthers & Dixon's port superintendent, was in and about the "Monongahela" during all of the time of the discharge of the lighter. He testified that she was riding on an even keel as late as three-thirty o'clock, Monday afternoon



(Apostles, pp. 141, 142). The witnesses, Crowley and McAndrews, saw the "Crowley 76" at about four o'clock Monday afternoon, and they testified that at this time the barge had begun to list. She turned over at about 4:40 o'clock.

Appellant's counsel have urged that nothing was done to trim the barge.

What is meant by "trimming"? Webster's dictionary defines the verb "to trim" "in a nautical sense" as follows:

"To adjust to a position in the water, as a ship or small boat, by arranging the ballast, cargo or persons, especially on each side of the center and at each end, that she shall sit well on the water, sail well, etc."

Can it seriously be contended that when sand ballast is loaded on a lighter in the fashion we have described, that a special operation called "trimming the barge" is necessary? Is there peculiar magic, anything sacrosanct in the word "*trim*"? What is the purpose of building up cones at intervals on the barge; of shifting the barge from time to time as the sand is dumped on it, if not to trim her? What sort of material was it which was being dumped on the "Crowley 76"? The witnesses all described it as "sand ballast". Libellant's own witness Charles Messick said:

"The gravel was loose enough to spill over the edge of the bucket if the bucket was too full, or if the bucket was jarred." (Apostles, pp. 241-242.)

It will be remembered that this sand ballast had been shoveled out of ship's hold into buckets before

the buckets were shot over the boom and their contents dropped on the lighter. Are we to believe that this material was so hard and so packed that it could be dug from the hold of a ship, shoveled into buckets and then dumped from the buckets on to the deck of a lighter below without spreading? What did libellant's witness Wilder mean when, in answer to the court's question: "What is your idea of correct loading, Mr. Wilder"? he said:

"A. Well, the proper way to load sand on a barge of that kind is to carry it along evenly.

Q. To build a cone five or six feet high and then move the barge, and then another?

A. Yes, and carry it right along, and work back again; *then you keep your barge in trim*, and there is no danger." (Apostles, p. 94.)

Now, we think this language of the witness supports the conclusion which one naturally would draw from the testimony of all the witnesses put together upon the proper method of loading a barge. Gravel and sand in themselves have a tendency to spread. Naturally, as the material was dumped, it would spread out and as more buckets were dumped the base of the cone would spread more and more. The evidence shows that the ballast was not piled in one cone, but that the lighter was moved frequently to build up other cones. For example, on the day of the accident the barge was shifted at 12 o'clock and again at two o'clock (Apostles, pp. 66 and 67). This was all in accord with the approved and customary method of loading. The result of this would be an even distribution of the weight of the ballast over the barge. The method of loading itself provided

for trimming the barge. The fact that on three occasions representatives of the Crowley Company observed the method in which the barge was being loaded and trimmed and yet had no criticisms to make is strongly persuasive that respondents were not subject to criticism. It is also indicative of some doubt or fear on the part of the Crowley company concerning the barge's capacity and strength.

We have then the case of a barge, chartered to carry a particular kind of cargo, and a particular amount of cargo. The kind of cargo for which she was chartered and the amount for which she was chartered was put on the barge according to approved methods of loading. Nevertheless, the barge began to leak, to list and eventually to overturn. What was the cause of it? This brings us to a consideration of another point urged in the trial court, upon which some testimony was offered, viz.: that the barge was held tightly by a steel cable and strong hawsers against the side of the "Monongahela". Appellant's brief on appeal does not consider the point urged in the brief in the court below that appellants were responsible for the manner in which the barge was tied to the side of the ship.

We shall consider this point briefly.

**(c) The libelant was responsible for the method by which the lighter was fastened to the ship.**

It was suggested in the court below, and possibly may be urged in the oral argument on the appeal, that the lighter was improperly moored to the side of the ship. She was fastened by four lines to the outboard

and inboard bitts, and libellant was itself responsible for this manner of making her fast to the ship. Mr. Wilder, the superintendent of the company, testified that when the lighter was sent over to the "Monongahela" Tuesday evening, a Crowley employee was sent with the lighter with lines belonging to the Crowley Company, for the purpose of tying the barge to the ship. Next day he went all over the lighter and re-fastened the lines himself. He testified, on direct examination:

"Mr. THACHER to Mr. WILDER. Q. After she went over to the 'Monongahela' job, Mr. Wilder, when did you next see her?

A. The following morning.

Q. That is, Wednesday?

A. That is Thursday morning, I saw her.

Q. What were the circumstances of your seeing her; from where did you see her?

A. Took a look at her again, went down below; when we put her in that evening, it came on to blow, and one of our deck hands, I did not think, made her fast properly, so I refastened her, went below again, and everything looked O. K. to me." (Apostles, p. 82.)

Later Mr. Wilder in the course of cross-examination, when questions were being asked by Mr. Griffiths, Mr. Thacher and the court, alternately, testified thus:

"Q. Did I understand you to say that when the barge came over there the first time, one of your deck hands made her fast to the ship?

A. Yes.

Q. With whose ropes, yours or the ship's?

A. My own, first.

Q. Where did you fasten her, to the out-board bitts?

A. Yes.

Q. And to the in-board bitts, too?



A. Yes.

Q. And you did that, that is, your man did that?

A. Yes.

Mr. THACHER. Q. Were you there?

Mr. GRIFFITHS. Wait a minute. You can take him on cross-examination. He testified one of the deck-hands made her fast.

Mr. THACHER. I think this is hearsay.

Mr. GRIFFITHS. You took it on direct examination.

Mr. THACHER. Just ask him what he saw in regard to the tying of the lines, because I do not think he was there when the barge was brought over.

The COURT. He said he was there when the barge was brought over.

A. No.

Q. You said you were there Tuesday night when one of the deck hands made her fast.

A. I said one of our deck hands did; we sent him over for that.

Q. You don't know who fastened it?

A. That is what we sent him along there for.

Q. Then you suppose he fastened it?

A. I suppose so.

Q. I got the impression you were there and saw it.

A. No.

Mr. GRIFFITHS. It is customary for you to send deck hands to fasten your barges; that is what you base your answer on?

A. Yes.

Q. You did send deck hands along with this barge to fasten it to the 'Monongahela'?

A. We sent one, yes, but after leaving the barge there, we generally leave the barge in the care of those on the ship.

Q. But you took her there and you fastened her, didn't you?

A. He did, yes.

The COURT. You say, 'he did'; you don't know whether he did, or not. I could just as well say he did as you can. How do you know your man fastened it?

A. That is what we sent him there for, that is all; he fastened the line to the vessel." (Apostles, pp. 89, 90, 91.)

From Mr. Wilder's testimony taken as a whole it is quite apparent that on the evening the lighter was taken to the ship one of the Crowley deckhands was sent to fasten her, and that Mr. Wilder himself went over the lighter the day after she was taken to the ship and refastened her himself. Mr. Sennott, the Crowley Company's outside man, was on the lighter Saturday and Sunday and made no objection to the method in which she was moored.

"Q. When you saw the barge on Sunday, how was she moored to the side of the vessel?

A. There were four lines on her, two on the inshore and two on the offshore; one was a wire cable.

Q. You were on the 'Monongahela' at that time?

A. On Sunday?

Q. Yes.

A. Yes, I was aboard of her.

Q. Did you suggest any objection to that method of mooring to the ship?

A. No, I did not.

Q. Did it seem all right to you?

A. The barge was all right then.

Q. And you had no criticism to make at that time?

A. No, not at that time." (Apostles, p. 101.)

The way in which the barge was moored to the ship was the libelant's way, and of its doing.

(d) The respondents were not at fault for not cutting the lines which held the lighter to the ship.

It is further urged in libelant's brief, that the ultimate cause of the lighter's loss was the fact that her lines were not cut after the lighter began to leak and list. It is argued that if the lines had been cut, the "Crowley 76" would have swung clear from the "Monongahela"; would have dumped her load and would have remained unhurt; and that, eliminating all the other evidence, the charterers were liable for their failure to cut the lines and let the barge dump her load.

It will be remembered that the barge did not begin to list, as nearly as can be calculated, until about four o'clock. Her destruction occurred at 4:40. There were forty minutes, then, in which action could be taken to save the barge. If it be conceded that the respondents were not at fault in their previous management of the barge and were not responsible for the barge's leaking and listing, then they can only be liable for failure to use ordinary care thereafter. Did the respondents fail to use ordinary care? What should they have done? Cut the lines, or make an attempt to pump out the barge? Libelant now says, after the event, that by all means the lines should have been cut. But what was the judgment of libelant's men who were on the ground at the time? Mr. McAndrews said the thing to do was to pump her out. He testified as follows:

"Q. What would be the effect of the stern going down that way?

A. It would carry away the lines.

Q. What about the effect on keeping the water out?

A. *The only way you had to do, was, to try to righten her stern up, to get a pump on it, to keep the water out.*

#### Cross-Examination.

Mr. GRIFFITHS. Q. If you saw water coming into her, the thing to do would be to pump immediately?

A. Certainly, if they had a pump there.”  
(Apostles, p. 108.)

Apparently Mr. Crowley’s judgment was the same, for when he came to the conclusion that he did not like the position the barge was in against the ship, with a southeast wind coming up, his first idea was to telephone to his office to Mr. Wilder to “come over with something and try to straighten the barge up” (Apostles, p. 70).

It seems obvious to us that if this was the judgment of the Crowley people as the best way to right the barge in the emergency, the respondents cannot be charged with negligence because they did not take another and a different method to save her.\*

Considering all of the testimony together as to the character of the barge, the character and the amount of ballast loaded, and the mode of loading it, is there sufficient evidence to justify the trial Court in concluding that the libelant failed to make out its case? What is the most reasonable explanation of the loss of the

\*The libelant has stressed the fact that the mate of the “Monongahela” was not a witness. This is not a case where the testimony of any one witness was necessary for the correct disposition of the case. Upon the points on which the mate could have testified, the manner of loading and vessel’s draft, respondents produced witnesses as equally able to testify as the mate. The presumption to which libelant refers is not applicable where the witnesses’ testimony is merely cumulative. 22 Corpus Juris. 117-118.



barge? The trial Court thought it probable that the barge, being old, had sprung a leak and that, her equilibrium being disturbed, she began to list and finally to capsize. As Judge Hough pointed out in *Hastorf v. Standard Oil Company*, supra, it is notorious "that wooden vessels do at times begin to leak with a suddenness and violence quite difficult of explanation."

Putting all the evidence together, it is clear that the conclusions of the trial Court were in accord with the evidence. If, as respondents contended, and as the Court concluded, the lighter was not overloaded and was properly loaded, but nevertheless, without any fault on the part of respondents, the barge, being a wooden one, and an old one, began to leak because of her age or from some unknown cause, then the resulting accident was not to be charged to the fault of respondents. In the absence of negligence on the part of respondents, the accident would arise out of or be incident to the use for which the lighter was chartered. For this appellants were not liable.

In closing we beg to refer to the suggestion (appellant's brief, pp. 45, 46) that unless this court holds with appellant's contention it will be making "a change in the law." That does not truly, we respectfully submit, state the situation. It is appellant, not we, who is urging a change in the law. Appellant is urging that the bailee of a lighter be held an insurer. That is not now the law. Appellant would put the bailee of a lighter in the same category with a common carrier; for a private carrier, this court has held, is not an

insurer and a shipper must prove negligence affirmatively.

*The Lyra*, 255 Fed. 667 at page 668.

We ask simply that the court sustain the law as declared by the Circuit Court of Appeals for the Second Circuit in *Hastorf Contracting Co. Inc. v. Standard Oil Co.*, 272 Fed. 884, and by Judge Mack in *Hildebrandt v. Flower Lighterage Co.*, 277 Fed. 436, as affirmed by the Circuit Court of Appeals for the Second Circuit in the same case in 277 Fed. 438.

Libelant plead negligence on the part of respondent (Apostles, p. 10 article VI of the libel) and counsel for libelant essayed (opening statement Apostles, p. 49) to show that the lighter was overloaded and badly loaded.

The evidence having been heard, Judge Dooling found that it was not shown that the barge was overloaded, and the evidence as we have reviewed it shows she was not. Judge Dooling found that the barge was not improperly loaded.

Assuming then for argument that libelant made its prima facie case by showing delivery in good order and condition and failure to re-deliver in that condition in accordance with *Hildebrandt v. Flower Lighterage Co.* (277 Fed. 436 at 437, affirmed 277 Fed. 438), we went forward with the proof to explain what happened in accordance with the rules stated in that case. In the end as the Court came to review all the evidence, negligence was found not to have been found against the respondent, respondent's freedom from negligence was shown, and libelant was left in the situation of a moving

party which so far from making its case had had the case made against it, with the District Court finding that the barge was old and that her loss was probably due to her making more water than usual, as in

*Hastorf Contracting Co. Inc. v. Standard Oil Co.*,  
272 Fed. 884.

We respectfully submit that the judgment and decree of the District Court should be affirmed, with costs there and here to respondent.

Dated, San Francisco,

May 10, 1922.

McCutchen, Olney, Willard, Mannon & Greene,  
Farnham P. Griffiths,

*Proctors for Appellees.*

(APPENDIX FOLLOWS.)





## **Appendix.**



## Appendix

---

### *In the United States Circuit Court of Appeals for the Second Circuit*

---

John Hildebrandt,	Libellant-Appellant,
against	
Flower Lighterage Company,	Respondent-Appellee,
Steamtug "President", Clyde Steamship Company,	Appellee.

## BRIEF FOR APPELLANT

Appeal from a decree of the District Court, Southern District of New York (Mack, J.) dismissing the libel in an action on contract for failure to return a chartered scow.

### FACTS.

The libellant Hildebrandt chartered the scow "Elmen-dorf" to respondent, Flower Lighterage Company. It was the usual demise charter, the master going with the boat and paid by the owner. While the Flower Lighterage Company had the boat under charter she was placed on the north side of pier 45, Brooklyn, inside the slip and about 50 feet from the bulkhead (fol. 57). She had taken on a partial cargo. Work

was suspended for the night. The master sounded the boat, tied her up safely and then went to the pier office of the Clyde Line and was assured that no steamer was coming in and that his boat was safe for the night, and he thereupon left to get some clothes and other necessities. He returned the next morning and found the boat sunk (fols. 69-75).

During the night the tug "President" moved the boat, in the absence of the captain, around to the south side of pier 45, and tied her up alongside of another boat (fol. 151), and then went to South Brooklyn, and brought another boat and put her alongside of the "Elmendorf." This was about 9 p. m. (fols. 152-153). At 3 a. m. the "Elmendorf" was found sunk (fol. 153). There was a plank broken in the port bow corner of the boat (fols. 69-72-74), about two feet below the load line (fols. 94-96-106).

Upon raising it was found the cargo, consisting of barrels of molasses, had not shifted (fol. 83). Before this the boat was in seaworthy and good condition (Casey, fols. 59-63; Fox, fol. 113; Hildebrandt, fol. 116; Blomberg, fol. 148; Jarvis, fol. 158). No evidence was offered or could be offered as to just how the accident occurred and the question is upon whom the loss falls.

#### ARGUMENT.

##### POINT I.

**The Flower Lighterage Company, as charterer, is responsible for this unexplained disaster.**

Although a man went with the boat, the charter was, under repeated decisions in this court, a demise, and



the charterer was a bailee. The liability of the bailee as laid down in the case of *Terry & Tench Co. v. Merritt & Chapman Derrick & Wrecking Co.*, 168 Fed. 533, is clear. Circuit Judge Noyes held the charterer was under an obligation to show, first, *how the injury* occurred, and second, that it was free from negligence. It may be true that this may work a hardship in some cases upon the charterer, because although he may show that he did not cause the damage, yet he is liable because he is unable to say just how the accident occurred.

Nevertheless this is a salutary rule. The owner of the boat is unquestionably free from fault. The charterer controls the movements and has possession of the boat. If it suffices to excuse him that he simply proved his own personal freedom from any act which contributed to the disaster there would be few recoveries and an easy way provided for the charterer to exonerate himself from liability. This would lead to lack of care and precautions on the part of charterers.

## POINT II.

**The tug "President" is likewise responsible.**

The boat was left by the master in a perfectly secure place within a short distance from the bulkhead. She was moved without the consent of the master, and when he was not on board, despite the assurances that had been given to him that the boat would not be moved during the night. It is not negligence for a

master, under such circumstances, to leave his boat after properly securing it.

*Lewis v. Barber Asphalt Paving Co.*, 123 Fed.

161, *affd. sub nom.*;

*The Thomas Quigley*, 130 Fed. 336, Cert. denied

195 U. S. 628.

In the later case the Court (Coxe, C. J.) said (p. 337):

“She (the tug) should not have undertaken the voyage at all in the absence of the master, but, having done so it was her duty to deliver the ‘Stamford’ into the custody of some responsible person.”

It is probable that this damage occurred while the “President” shifted the “Elmendorf” or in placing the third scow alongside, but manifestly the libelant was in no position to show this. But if the master had been on board and some other vessel had made this small break in the bow of the “Elmendorf” it is a reasonable assumption that the master could have kept the boat pumped out or summoned help which would have prevented her from sinking.

Here again the helplessness of the libelant is apparent. If this tug actually did this damage she would not be apt to admit it.

Cases against warehousemen are analogous. A warehouseman who takes goods from one building where he agrees to store them and puts them in another without the consent of the owner is liable for their damage, although caused by no negligence of his own,

*Mortimer v. Otto*, 206 N. Y. 89;

the reasoning in which case applies to the case at bar.  
To the same effect are:

*Lilley v. Doubleday*, L. R. 7 Q. B. D. 510;

*Michaels v. N. Y. C. R. R. Co.*, 30 N. Y. 564;

*Bostwick v. B. & O. R. R. Co.*, 45 N. Y. 712, 717.

### POINT III.

The decree should be reversed, both respondents held responsible, execution to issue in the first instance against the tug "President".

Respectfully submitted,

MACKLIN, BROWN, PURDY & VAN WYCK,

Proctors for Appellant.

PIERRE M. BROWN,

Advocate.



No. 3846

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CROWLEY LAUNCH AND TUGBOAT COMPANY  
(a corporation),

*Appellant,*

vs.

UNITED STATES SHIPPING BOARD EMERGENCY  
FLEET CORPORATION (a corporation), and  
the American Ship "MONONGAHELA", her  
engines, tackle, apparel, etc.,

*Appellees,*

UNITED STATES OF AMERICA,

*Claimant.*

REPLY BRIEF FOR APPELLANT (LIBELANT).

THACHER & WRIGHT,  
*Proctors for Appellant  
(Libelant).*

THOMAS A. THACHER,  
HARRISON A. JONES,  
*Of Counsel.*

FILED

MAY 23 1922

F. D. MONCKTON,  
CLERK





No. 3846

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

---

CROWLEY LAUNCH AND TUGBOAT COMPANY  
(a corporation),

*Appellant,*

vs.

UNITED STATES SHIPPING BOARD EMERGENCY  
FLEET CORPORATION (a corporation), and  
the American Ship "MONONGAHELA", her  
engines, tackle, apparel, etc.,

*Appellees,*

UNITED STATES OF AMERICA,

*Claimant.*

---

## REPLY BRIEF FOR APPELLANT (LIBELANT).

---

Separate consideration will be given to each of the several parts into which the brief for the appellees falls.

---

### I.

#### ARGUMENT THAT APPELLANT SEEKS TO MAKE APPELLEES INSURERS.

The appellees urge that the appellant seeks to make the appellees insurers. In so urging the ap-

pellees overlook the fact that if the charterer was an insurer it would be liable, irrespective of negligence. No one claims this, however, and insurance is not in any way involved in the present case. The demise charterer of a barge must, however, show its freedom from negligence; or, in other words, must show everything that it did and establish that what it did was not negligence.

---

## II.

### ARGUMENT THAT BURDEN OF PROOF NEVER SHIFTS.

This doctrine, first strongly advocated by Professor James Bradley Thayer, is of more academic than practical interest. Most judges, including many distinguished judges of the United States Supreme Court, have, after a plaintiff has made a *prima facie* case, ordinarily referred to the burden of proof as being on the defendant. Whether the ordinary term, "burden of proof", is used, or whether Professor Thayer's phrase, "burden of procedure", makes no practical difference. The fundamental question remains the same: what is a demised charterer obligated to prove when a chartered vessel in its possession is destroyed? Unless the Terry & Tench and the Swenson cases have been overruled, the charterer must show: how the accident occurred, and that the charterer was free from negligence.

## III.

## THE HASTORF AND HILDEBRANDT CASES.

The appellees do not attempt to distinguish or criticise the Terry and the Swenson cases. Reliance is rather put on the Hastorf and Hildebrandt cases.

The Hastorf case is clearly distinguishable from the present case. In the Hastorf case a scow with an admittedly small load began to leak. The scow master on board and employed by the owner testified to what was evidently a fantastic method of loading.

The Court said:

**"This story is wholly denied by the stevedores, and their denial is aided by the one disinterested witness, an employee of the owner of the pyrites. \* \* \***

**"In this case libelant's witnesses describe a style of loading not only improper, but foolish and unnecessary. Their testimony was rejected below, as we would have rejected it had the testimony been taken by deposition and we had been the first to examine it judicially. \* \* \***

**"Considering, therefore, that the apparently disinterested evidence favors appellee, the case somewhat resembles The Florida, 256 Fed. 22; 167 C. C. A. 294, and as in that case we affirm the decree**  
\* \* \*"

The appellees by parallel columns seek to show that the Hastorf case and the present case are similar. We take the liberty of repeating the columns, with our comment:

**"Hastorf Case.**

"1. An unexplained leak followed by a list and capsizing."

**"Case at Bar.**

"1. An unexplained leak followed by a list and capsizing."

Our comment: There was not an *unexplained* leak in the present case. Captain Langren on deposition stated:

*"From the position I saw the lighter in, I would say she would open up her seams and break her back.*

*Q. Why?*

*A. Because she was buckling, she was unevenly loaded; the outboard corner was more heavily loaded than the amidships section of the barge, having a tendency to twist the barge and break the barge's back, and open up the bottom seams and side seams, causing the barge to take water"* (Langren, 195).

(For the testimony of other witnesses showing cause of buckling see opening brief.)

<p>"2. A charge of negligence in the loading of a vessel by the charterer."</p>	<p>"2. A charge of negligence in the loading of a vessel by the charterer."</p>
---	---

Our comment: This is correct. To constitute a cause of action in a demise case of this kind there must be an allegation of negligence.

<p>"3. Conflicting evidence offered in open court upon this issue."</p>	<p>"3. Conflicting evidence offered in open court upon this issue."</p>
---	---

Our comment: This is correct, but is in a measure misleading. In the Hastorf case the evidence was all taken in open court. Here 135 pages of testimony were taken in open court and 83 pages by deposition. **The testimony of the three independent witnesses, Langren, Zecher and Messick, was all by deposition, and constituted the most important evidence in the case.**



"4. The issue as to the propriety of the loading resolved in favor of the respondent."

"4. The issue as to the propriety of the loading resolved in favor of the respondent."

Our comment: The District Court only went so far as to say that the *method* of loading was not improper. Such a finding as "4" above was in the proposed decree, which the Court refused to sign.

"5. The court resorted to the inference that the scow had leaked from inherent defects."

"5. The court resorted to the inference that the scow had leaked from inherent defects."

Our comment: The Court said: "It is just as likely that the barge, being old, made more water than usual, and that this was the cause of her loss." The Court made no finding that the barge leaked from inherent defects and there was no evidence that it usually made water.

**The only independent witnesses in the case at bar** (Langren, Zecher, Messick and Jones) **testified that the barge was overloaded and badly loaded.** No one testified that the barge was not in a tender condition after 2 P. M. on the day of the accident. The only witnesses produced by the respondents to show the condition of the lighter after that time were two employees, Scott and Woodside. These witnesses were on the "Monongahela" only occasionally and merely testified that looking at the barge at about 3:30 she seemed to be on an even keel (Scott, Woodside). The respondent did not call the mate of the "Monongahela" or any witnesses who were on the "Monongahela" all or a greater part of the time from 2 P. M. to 4:40 P. M.

The Hildebrandt case involved the following state of facts:

John Hildebrandt chartered a scow to the Flower Lighterage Company. The charter was the demise form usual in New York City, under which the master goes with the scow and is paid by the owner. The scow took on a part cargo and on the night in question was left in good condition by the master on the north side of Pier 45, Brooklyn. At about 9 P. M. that night the tug "President", acting independently, and not an agent of the lighterage company, moved the scow to the south side of the pier and put another barge alongside of her. At 3 A. M. she was found sunk with a plank broken in at the port bow corner.

An action was filed against the lighterage company and the tug "President". The libelant urged that both respondents be held liable, with execution to issue in the first instance against the tug "President" (Point III, brief P. M. Brown; see appellees' brief, V).

The Court in its oral opinion held "that while it cannot be positively said how the damage arose, the probability, under all the evidence, is that it arose after the boat was shifted". The Court said of the lighterage company: "It did nothing, so far as the evidence shows, that can be called negligence, and everything that it did do is shown." In other words, the appellee rebutted the presumption of negligence by proving to the Court that it was not negligent. *The Hildebrandt case is thus in accord with the*

*Swenson case and the Terry & Tench case in holding that to escape liability the charterer must show that he has been free from negligence.*

The appellees urge that the Hildebrandt case in effect overrules the Terry & Tench case and the Swenson case in their holding that the charterer, to escape liability, must show the cause of the loss. That this is or was intended to be the effect of this case we do not believe, for a number of reasons. It seems entirely unlikely that Judge Mack, coming from an outside circuit and sitting in the New York District Court, would give an oral opinion overruling a principle of law settled by the Circuit Court of Appeals of the Second Circuit. An examination of the opinion and also of the facts as brought out in the appendix to appellees' brief shows that he did not do this.

In the Hildebrandt case there was one bailee, the Flower Lighterage Company, and there was also the tugboat company, for whose actions the lighterage company was not responsible. The scow passed from one to the other. It was not positively shown in whose hands the injury occurred, although the Court said it probably happened after the scow was shifted by the tugboat company. The appellant urged that the tug was primarily liable.

The Court said:

*"The tug was not the agent of the respondent, so as to make the respondent absolutely responsible for its acts, and therefore the respondent is not bound to show affirmatively that the tug shifted properly, and that the damage did not*

*occur while the tug was shifting, or as a result of the shifting, or as a result of the tying up."*

In other words, had the tugboat company and the lighterage company been one, and had it been shown that the scow was delivered to it in good order and received in bad order, the lighterage company would have been compelled to prove that the damage did not occur as a result of the shifting or mooring of the barge. To show this, the cause of the damage would clearly be brought out.

An examination of these two cases, therefore, makes it evident that there is nothing in either to indicate that the principles of the Terry or Swenson cases are overruled. If the Circuit Court of Appeals were to overrule the two earlier cases it would overrule them specifically. It is not made up of men who, instead of admitting former mistakes of law, overrule established principles by affirming without opinion oral opinions of courts below. However, the facts as above outlined make it clear that the Hastorf and Hildebrandt cases are entirely different in facts from the Terry and Swenson cases and the case at bar.

---

#### IV.

##### THE CAPTAIN MILLS THEORY.

The appellees continuously emphasize and state that the calculation of Captain Mills was "a calculation made before the injury to the lighter, and



not for the purposes of this suit'' (Appellees' Brief, 41, 43, 44). It is true that Captain Mills first testified that this was the case. **He testified subsequently that it was made up several days after the date of the accident.** *A third time he said he did not know just when he made the calculation* (see opening brief, p. 35).

The appellees in their brief state relative to the draft marks of the ship:

“The lens of the human eye was therefore in just as favorable a position for estimating the draft as was the photographic lens” (Appellees' Brief, 41).

We will not argue that the eye is not as accurate as a camera lens. We do say, however, that if by expert evidence made up by an expert after the cause of action arises a charterer can overthrow the uniform testimony of four disinterested witnesses who testified as to what they actually saw, then direct evidence of eye witnesses seems to be of very little value.

The admittedly incorrect testimony of Captain Mills, already discussed in our opening brief, makes it, in our opinion, unnecessary to discuss his testimony further.

---

## V.

### THE LOADING OF THE BARGE.

The “method of loading”—the piling in four cones—was probably sufficiently proper. It was



not the loading on Friday, Saturday and Sunday that broke this barge. There was evidently nothing wrong with the barge on Monday morning. What broke the barge was the loading on her after foreman Messick demanded another barge on Monday morning. It was the piling of ton after ton on the barge after "she was really full". It was "loading more and more" on the barge after the cones were so high that they commenced to slide (Messick, 233). The situation may be briefly summarized by saying that we have here a barge loaded with **heavy, sticky, clay ballast**, piled in four cones some fifteen feet high. One of the cones finally becomes so high that the clay slides towards an outboard corner, giving the barge a list. The barge is thereupon moved and loading resumed on the diagonally opposite corner. This creates a strain and results in buckling the barge and opening up her seams. The loading of ballast nevertheless continues, and is continued almost up to the time of her very destruction.

---

## VI.

### TRIMMING.

The appellant in its opening brief pointed out that the charterer in the case at bar did not attempt to trim the barge until after it had been buckled and disaster was imminent. The appellees answer:

"Is there peculiar magic, anything sacrosanct, in the word 'trim'?" (Appellees' Brief, 47).

Appellees then argue that the ballast did not need trimming because it would spread out as buckets were dumped (id. 48). **So far as the ballast running like clean, dry sand, was concerned, it was not denied that the ballast was a wet, cakey, clayey sand and gravel mixture which would not run.** Of course it would “spill over the edge of the bucket if the bucket was too full” (id. 47), but so will coal and every other cargo which by its very nature must be trimmed in a ship.

---

## VII.

### THE FASTENING OF THE LINES.

Appellees urge that the Crowley Company was responsible for the method by which the lighter was made fast to the ship. The lighter was apparently made fast by the Crowley Company prior to the loading, and was later moved alongside the ship from time to time and refastened by the employees of the charterer or of its agents. We have no fault to find in the original fastening of the lighter to the ship, and we presume that the way in which the barge was made fast on Saturday and Sunday was not objectionable. However, the failure of the charterers to cut or loosen the lines on Monday, when the lighter listed outboard, was to invite its destruction. The pressure on the outboard side of the barge simply caused the inboard side to be jammed against the iron ship with such tremendous force that the lighter collapsed.

**CONCLUSION.**

This reply brief is very little more than an annotation of the appellees' brief. The undisputed facts brought out in our opening brief remain undisputed.

We therefore again repeat: If the libelant in this case cannot recover, not only has the law of charterer's liability been changed, but owners of demised vessels have been placed in a position where they have practically a negligible chance of recovering against charterers for injuries to lighters occurring while in the charterers' possession.

Dated, San Francisco,

May 24, 1922.

Respectfully submitted,

THACHER & WRIGHT,

*Proctors for Appellant  
(Libelant).*

THOMAS A. THACHER,

HARRISON A. JONES,

*Of Counsel.*

No. 3846

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

CROWLEY LAUNCH AND TUGBOAT COMPANY  
(a corporation),

*Appellant,*

vs.

UNITED STATES SHIPPING BOARD EMERGENCY  
FLEET CORPORATION (a corporation), and the  
UNITED STATES OF AMERICA, as claimant of  
the American Ship "Monongahela", her  
engines, tackle, apparel, etc.,

*Appellees.*

## REPLY BRIEF FOR APPELLEES.

FARNHAM P. GRIFFITHS,

McCUTCHEN, OLNEY, WILLARD, MANNON & GREENE,

*Proctors for Appellees.*

**FILED**

JUN 6 - 1912

F. D. MONKTON  
CLERK





No. 3846

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

---

CROWLEY LAUNCH AND TUGBOAT COMPANY  
(a corporation),

*Appellant,*

vs.

UNITED STATES SHIPPING BOARD EMERGENCY  
FLEET CORPORATION (a corporation), and the  
UNITED STATES OF AMERICA, as claimant of  
the American Ship "Monongahela", her  
engines, tackle, apparel, etc.,

*Appellees.*

---

## REPLY BRIEF FOR APPELLEES.

---

We shall avail ourselves of the court's permission to consider briefly matters urged in appellant's reply brief.

---

### THE BURDEN OF PROOF AND THE NEW YORK FEDERAL CASES AS APPLIED TO THIS CASE.

Appellant endeavors lightly to dismiss Thayer's discussion of the term "burden of proof" and to ignore

Wigmore's "risk of non-persuasion" as "academic". This characterization of an argument does not answer it; particularly when the argument emanates from authorities so renowned as these great jurists; and especially when the argument has found such apt and pertinent recognition to the very situation involved in the case at bar as Judge Mack gave it in *Hildebrandt v. Flower Lighterage Co.*, 277 Fed. 436, where he said:

"I cannot agree with counsel that the prima facie case can be met only by showing how the accident happened. In my judgment the true principle of law is *that the burden of proof is on the libelant to establish negligence*; that burden is prima facie met in the case of a demise by showing the failure to return in good condition, subject to ordinary wear and tear. *That puts upon the defendant the burden of going forward with evidence to show a lack of negligence on its part.* But when all the evidence is in, the court must weigh the situation and say: Was the respondent guilty of negligence or not?"

Judge Mack was affirmed by the Circuit Court of Appeals for the Second Circuit (277 Fed. 438) and these are precisely the distinctions that we urge and which appellant would have this court dismiss as "academic".

Now, that it has been noted (our opening brief pp. 19-20) that appellant's so-called "last word of law" on the subject from the *Schoonmaker* case is inapplicable here, appellant seems to have abandoned that case but clings still to the *Swensen* and *Terry* cases, as authorities controlling the decisions in the later *Hastorf*

and *Hildebrandt* cases. Relying on the two first named cases appellant argues that the Circuit Court of Appeals for the Second Circuit enforces an absolute liability upon a demise charterer who is unable to explain the loss of the bailed chattel; this despite the fact that in the last cases from that circuit (the *Hastorf* and *Hildebrandt* cases) the charterer was held not liable though unable to explain the cause of the loss.

If it were important here to harmonize what may at first blush seem a want of accord between the earlier and the later cases from the Second Circuit, it might be suggested that the rule laid down in the *Swensen* and *Terry* cases at most applies only where there is an express covenant to return in good order and condition, and that in the absence of such express covenant "there is" (in the words of the *Schoonmaker* case which postdates the *Swensen* and *Terry* cases) "no liability for injury to the vessel without proof of negligence" (268 Fed. at p. 104). In our case there was no such covenant. But we need not amplify along these lines or indeed determine whether the earlier and later cases need harmonizing. It is sufficient for present purposes that the *Swensen* and *Terry* cases were before the Circuit Court of Appeals for the Second Circuit when it affirmed Judge Mack's decision in the *Hildebrandt* case (our opening brief, p. 27), and that Judge Ward who sat in the *Hastorf* case in 1921 sat also in the *Terry* case in 1909; and that our case obviously comes within the rule announced and followed in the *Hildebrandt* and *Hastorf* cases. The gist of the rule is that the trial

court must be persuaded of the respondent's negligence, and that the fact that the respondent cannot put his finger upon the precise cause of the loss does not *per se* convict him of negligence.

Nor has appellant maintained a consistent position with regard to the rule it seeks to justify. First appellant urged that the charterer was obliged to explain the precise cause of the loss, relying on the *Schoonmaker*, *Swensen* and *Terry* cases, and making no reference to the later *Hastorf* and *Hildebrandt* cases. Now that the *applicable part* of the *Schoonmaker* case has been shown to be adverse to appellant's contention, and that the *Hastorf* and *Hildebrandt* cases must be met, appellant abandons the former and (in effect) says of the latter that in them the charterer *more nearly* showed what happened than the appellees did in the case at bar. An appellant who comes to this after the strong position taken in its opening brief (that the charterer of the barge must show the cause of the loss absolutely or be liable), seems to be fighting pretty well with its back to the wall. If the obligation is absolute it will not do to say that the respondents in the particular case *pretty nearly* fulfilled their obligation. If appellant justifies the *Hastorf* and *Hildebrandt* cases, because in them the charterer *almost* explained the cause of the loss, then Judge Dooling's decision in this case must stand. There being no requirement to show the exact cause of the loss, the whole case goes back to the rule with which we started: Did the appellant, upon the

entire record satisfy the trial court that the appellees were guilty of negligence?

It is patent that it did not. The trial judge found it not shown that the barge was overloaded and the evidence as it has been reviewed shows it was not. As to method of loading there was a positive finding by a trial judge who heard and saw most of the witnesses that it was proper. These were the chief issues before the trial court as outlined by appellant's counsel in his opening statement (Apostles, p. 49). Failing in them counsel has in the briefs resorted to other charges. They have been fully considered in the earlier briefs and we believe the evidence amply sustains the trial court's absence of any findings of negligence in respect to any of them. There was no negligence and the fair inference is that the "Crowley 76" was lost on account of inherent weakness, as in

*Hastorf Contracting Co. v. Standard Oil Co.*, 277  
Fed. 884.

---

**"DISINTERESTED WITNESSES".**

When appellant referred in its opening brief to the witnesses Langren and Zecher as "independent" or "disinterested" (appellant's opening brief, pp. 19, 30), and even when its counsel repeated the claim on the oral argument, we were disposed to let it pass. But now that we have that claim set up in black type in appellant's second brief (p. 5) we may be permitted to remark that these men Langren and Zecher were



employed on the tug "Reliance" which was operated by the Shipowners and Merchants Tugboat Company, of which Mr. Thomas Crowley was the manager (Apostles, p. 208), and that Mr. Thomas Crowley verified the libel against the "Monongahela" in his capacity as president of the appellant corporation (Apostles, p. 34). How disinterested Zecher and Langren were likely to be in testifying in favor of the appellant may well be the subject of entertaining conjecture.

---

#### **CAPTAIN MILLS' SURVEY.**

Appellant says that Captain Mills' calculations were made up several days after the accident (reply brief, p. 9). The fact is that Captain Mills said he made out his survey report on December 22nd (Apostles, p. 178), but that the report was prepared on figures taken previously at the close of the discharge (Apostles, p. 174).

---

#### **METHOD OF LOADING.**

We have at last the admission in the reply brief that up to Monday morning there was nothing wrong with the barge or in its handling by the appellees, but that loading an additional amount on Monday caused the loss (reply brief, p. 10). Then the case comes to this: Appellees' handling of the barge and loading her in cones, with the trimming consequent thereon, were

proper, and it was the quantity loaded on Monday (we are told) that broke her. If, however, the amount loaded on Monday only brought the total amount loaded up to the amount which she was chartered to carry, what was the cause of the loss? Obviously her unfitness to carry the amount which she was chartered to carry.

---

#### THE EFFORT TO MAKE BAILEES INSURERS.

Our suggestion that appellant would make the bailee of a barge an insurer was in connection with the answer to appellant's contention that we were asking a change in the law. We pointed out that if appellant would hold a barge owner liable simply because the cause of the barge's loss had not been precisely shown, though extensive evidence had gone in on the circumstances surrounding the loss, and the trial judge had found that there was an absence of negligence and that the loss of the barge was probably due to inherent defect—then appellant was asking a change in the law to make the bailee of a barge an insurer in the sense that a common carrier is said to be an insurer (our opening brief, pp. 55-56). We cannot quite make out whether appellant still clings to that view. If it does, what we have said about the effort to make bailees insurers still applies. That would not be so, of course, if, now that the *Hildebrandt* and *Hastorf* cases have been called to its attention, appellant's position is, as we surmise,

that it cannot agree with the trial judge as to the adequacy of the evidence to exonerate appellees.

Dated, San Francisco,

June 5, 1922.

Respectfully submitted,

FARNHAM P. GRIFFITHS,

McCUTCHEM, OLNEY, WILLARD, MANNON & GREENE,  
*Proctors for Appellees.*

United States  
12  
Circuit Court of Appeals  
For the Ninth Circuit.

---

WALTON N. MOORE DRY GOODS CO., IN-  
CORPORATED, a Corporation,  
Plaintiff in Error,

vs.

COMMERCIAL INDUSTRIAL COMPANY,  
LTD., a Corporation, Successors of J. J.  
CHOOBIN & CO., A. V. KASSIANOFF  
& CO.,

Defendant in Error.

---

Transcript of Record.

---

Upon Writ of Error to the Southern Division of the  
United States District Court of the  
Northern District of California,  
Second Division.

---

FILED  
P APR 18 1922  
F. D. MONCKTON,  
CLERK





United States  
Circuit Court of Appeals  
For the Ninth Circuit.

---

WALTON N. MOORE DRY GOODS CO., IN-  
CORPORATED, a Corporation,  
Plaintiff in Error,

vs.

COMMERCIAL INDUSTRIAL COMPANY,  
LTD., a Corporation, Successors of J. J.  
CHOOBIN & CO., A. V. KASSIANOFF  
& CO.,

Defendant in Error.

---

Transcript of Record.

---

Upon Writ of Error to the Southern Division of the  
United States District Court of the  
Northern District of California,  
Second Division.

---



# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

---

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	Page
Affidavit of G. S. Garrissere. ....	53
Affidavit of Vasiliy A. Haieff. ....	38
Affidavit of Nicholas N. Ivanoff. ....	34
Affidavit of Walton N. Moore. ....	42
Assignment of Errors. ....	60
Bill of Exceptions. ....	27
Bond on Writ of Error. ....	62
Certificate of Clerk U. S. District Court to Judgment-roll. ....	16
Certificate of Clerk U. S. District Court to Transcript of Record. ....	66
Citation on Writ of Error. ....	69
Complaint. ....	1

## EXHIBITS:

Plaintiff's Exhibit "A"—Letter Dated March 10, 1921, Commercial—Industrial Company, Ltd. to Walton N. Moore Dry Goods Co. ....	47
Plaintiff's Exhibit "B"—Letter Dated March 10, 1921, P. P. I. I. Tschurin & Co. to Walton N. Moore Dry Goods Co. ....	48

Index.	Page
EXHIBITS—Continued:	
Plaintiff's Exhibit "C"—Letter Dated March 8, 1921, Commercial House, J. J. Choorin & Co. to Walton Moore & Co. ....	49
Plaintiff's Exhibit "D"—Letter Dated May 25, 1921, N. Ivanoff to Walton N. Moore Dry Goods Co. ....	50
Plaintiff's Exhibit "E"—Letter Dated June 1, 1921, N. Ivanoff to Walton N. Moore Dry Goods Co. ....	51
Judgment of Dismissal. ....	15
Minutes of Court—October 17, 1921—Order Granting Defendant's Motion to Quash Service of Summons, etc. ....	14
Minutes of Court—January 9, 1922—Order for Judgment, etc. ....	15
Names and Addresses of Attorneys of Record	1
Notice of Motion to Quash the Alleged Ser- vice of Summons upon Defendant and to Dismiss Said Action. ....	12
Opinion. ....	17
Order Allowing Writ of Error. ....	61
Order for Judgment, etc. ....	15
Order Granting Defendant's Motion to Quash Service of Summons, etc. ....	14
Order Granting Leave to Defendant to Appear Specially for the Purpose of Moving to Quash the Alleged Service Upon it of the Summons in This Action and to Dismiss Said Action; Also Extending the Time of	

Index.	Page
Defendant to Answer or Plead to the Complaint in This Action in the Event that Said Motion Be Denied, and Fixing Day of Hearing of Said Motion. ....	7
Order Settling, Certifying, and Allowing Bill of Exceptions. ....	57
Petition for Writ of Error. ....	58
Praecipe for Transcript of Record. ....	65
Return on Service of Writ. ....	6
Return to Writ of Error. ....	69
Special Appearance and Motion by Defendant for an Order Quashing the Alleged Service Upon It of the Summons in this Action and for a Further Order Dismissing Said Action. ....	9
Stipulation as to the Correctness of Bill of Exceptions. ....	56
Summons. ....	5
Writ of Error. ....	67





**Names and Addresses of Attorneys of Record.**

Messrs. GREGORY & GOODELL, Balfour Building, San Francisco, California,  
Attorneys for Plaintiff.

AMBROSE GHERINI, Esq., 460 Montgomery St., San Francisco, California, and BREWSTER F. AMES, Esq., Chronicle Building, San Francisco, California,  
Attorneys for Defendant.

---

In the Southern Division of the District Court of the United States for the Northern District of California.

No. 16,619.

WALTON N. MOORE DRY GOODS CO., INCORPORATED, a Corporation,  
Plaintiff,

vs.

COMMERCIAL INDUSTRIAL COMPANY, LTD., a Corporation, Successors of J. J. CHOORIN & CO., A. V. KASSIANOFF & CO.,  
Defendant.

**Complaint.**

Plaintiff complains of defendant and for cause of action alleges:

I.

That during all the times herein mentioned

plaintiff was and now is a corporation duly organized, incorporated and existing under and by virtue of the laws of the State of New York, doing business as a wholesale dealer in dry goods and other merchandise in the City and County of San Francisco, State of California, and elsewhere in the United States and foreign countries.

## II.

That during all the times herein mentioned defendant was and now is a corporation duly organized and existing under and by virtue of the laws of the State of Siberia, Russia, doing a commercial business therein and in the United States of America, and elsewhere in foreign countries.

## III.

That within four years last past plaintiff sold to defendant dry goods and other merchandise of the value of One Hundred Thirty-eight [1\*] Thousand Three and 05/100 (\$138,003.05) Dollars at its special instance and request. That said goods and other merchandise were shipped to defendant at Vladivostock, Siberia, and drafts with bills of lading attached were drawn upon and presented to said defendant at Vladivostock for the amount of the sales price thereof. That said drafts were not paid nor met by the defendant when presented for payment at said Vladivostock.

## IV.

That defendant then and there agreed with plaintiff that plaintiff should retake the said goods and ship the same out of Siberia, and should resell the

---

\*Page-number appearing at foot of page of original certified Transcript of Record.

same and charge the defendant with any loss which might be sustained by plaintiff in said transaction, and which said defendant then and there agreed to pay to plaintiff. That said goods were so transported out of Vladivostock by plaintiff and were sold by it in the City and County of San Francisco, State of California, to the best advantage possible, and that a loss in the amount of Fifty-six Thousand Seven Hundred Fifty-two and 53/100 (56,752.53) Dollars has been thereby sustained and suffered by plaintiff in such transaction by reason of the failure of defendant to take said goods and pay for the same. That due demand has been made by plaintiff upon defendant for the payment of the same but that defendant refused and still refuses to pay the same or any part thereof, and the full amount is now due, owing and unpaid from defendant to plaintiff.

WHEREFORE, plaintiff prays judgment against defendant for the sum of Fifty-six Thousand Seven Hundred Fifty-two and 53/100 (\$56,752.53) Dollars, together with interest and costs of suit.

GREGORY & GOODELL,  
Attorneys for Plaintiff. [2]

State of California,  
City and County of San Francisco,—ss.

Walton N. Moore, being first duly sworn, deposes and says:

That he is and was at all times herein mentioned the president of Walton N. Moore Dry Goods Co., Incorporated, a corporation, the plaintiff above;





Action brought in said District Court, and the Complaint filed in the office of the Clerk of said District Court, in the City and County of San Francisco.

GREGORY & GOODELL,  
Plaintiff's Attorneys.

**(Summons.)**

The President of the United States of America,  
GREETING: To COMMERCIAL INDUSTRIAL COMPANY, LTD., a Corporation, Successors of J. J. CHOORIN & CO., A. V. KASIANOFF & CO., Defendants.

YOU ARE HEREBY DIRECTED TO APPEAR and answer the complaint in an action entitled as above, brought against you in the Southern Division of the United States District Court for the Northern District of California, Second Division, within ten days after the service on you of this Summons—if served within this county; or within thirty days if served elsewhere.

And you are hereby notified that unless you appear and answer as above required, the said plaintiff will take judgment for any moneys or damages demanded in the complaint, as arising upon contract, or it will apply to the Court for any other relief demanded in the complaint.

WITNESS, the Honorable WILLIAM C. VAN FLEET, Judge of the said District Court, this 4th day of August, in the year of our Lord one thousand nine hundred and twenty-one, and of our in-

dependence the one hundred and forty-sixth.

[Seal]

WALTER B. MALING,

Clerk.

By J. A. Schaertzer,

Deputy Clerk. [4]

**Return on Service of Writ.**

United States Marshal's Office,  
Northern District of California.

I HEREBY CERTIFY that I received the within writ on the 4th day of August, 1921, and personally served the same on the 4th day of August, 1921, upon Commercial Industrial Company by delivering to and leaving with Vassil H. Hayeff, Managing Agent of the Commercial Industrial Company, said defendant named therein, personally, at the City and County of San Francisco in said District, a certified copy thereof, together with a copy of the complaint, attached thereto.

J. B. HOLOHAN,

U. S. Marshal.

By Laurence J. Conlon,

Office Deputy.

San Francisco, ———, 19—.

**Return on Service of Writ.**

United States of America,  
Northern District of California,—ss.

I hereby certify and return that I served the annexed Summons on the therein named Commercial Industrial Company, by handing to and leaving a true and correct copy thereof with Nicholas H. Ivanoff, Managing Agent of the Commercial Indus-

trial Company, personally, at San Francisco in said District on the 4th day of August, A. D. 1921.

J. B. HOLOHAN,

U. S. Marshal.

By Laurence J. Conlon,

Deputy.

[Endorsed]: Filed Aug. 16, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[5]

---

(Title of Court and Cause.)

**Order Granting Leave to Defendant to Appear Specially for the Purpose of Moving to Quash the Alleged Service Upon It of the Summons in This Action and to Dismiss Said Action; Also Extending the Time of Defendant to Answer or Plead to the Complaint in This Action in the Event that Said Motion Be Denied, and Fixing Day of Hearing of Said Motion.**

The Court having read the affidavits of Vasiliy A. Haieff and Nicholas N. Ivanoff in the above-entitled action this day filed and good cause appearing therefor, it is ordered that;

Defendant be and it is hereby granted leave to appear in said action specially for the purpose of moving the Court for an order quashing, annulling, setting aside and holding for naught the alleged service of summons in said motion attempted to be made upon defendant and dismissing said action.

The time within which defendant may appear

herein generally to answer or otherwise plead to the complaint herein is hereby extended and enlarged to and including the 10th day after the entering herein of an order denying the aforesaid motion of defendant in the event that said motion be denied.

Neither the application for, nor the making of, or filing of this order, nor any reliance thereon by defendant, nor the proceedings to be taken, nor the motion to be made to quash service of summons and to dismiss said action shall be deemed or construed to constitute a general appearance by defendant, or waiver by said defendant of any objection to be urged on said motion to quash service of summons or for a dismissal of this action.

The hearing of said motion of defendant is hereby fixed for Monday the 29th day of August, 1921, at ten o'clock A. M. of said day in the courtroom of this court, in the Postoffice Building, corner of Seventh and Mission Streets, San Francisco, California, [6] and notice of the same shall be served upon the plaintiff in said action not less than 3 days before the date hereby fixed for said hearing.

Dated: San Francisco, California, August 25th, 1921.

WM. C. VAN FLEET,  
Judge.

Due service of the within order and receipt of copy is hereby admitted this 25th day of Aug., 1921.

GREGORY & GOODELL,  
Attorneys for Plff.



[Endorsed]: Filed Aug. 25, 1921. W. B. Mal-  
ing, Clerk. [7]

---

(Title of Court and Cause.)

**Special Appearance and Motion by Defendant for  
an Order Quashing the Alleged Service Upon  
It of the Summons in this Action and for a  
Further Order Dismissing Said Action.**

Now comes the defendant herein by Ambrose Gherini and Brewster F. Ames, its attorneys, appearing therein specially for the purpose of this motion, and for no other purpose; and without submitting itself to the jurisdiction of this Court, moves said Court for an order quashing the alleged service upon it of the summons in this action and for a further order dismissing said action upon the following grounds:

(1) Said alleged corporation defendant is not, and never was, a corporation organized or existing under or by virtue of the laws of the State of California, and has not now, and never has had, an office or place of business within the Northern District of California nor elsewhere within the State of California, and has never carried on, conducted nor transacted any business therein.

(2) The contracts of sale referred to in the complaint herein was neither entered into, made, nor to be performed, nor was it broken in the Northern District of California, nor elsewhere in the State of California nor in the United States of America.



(3) Defendant does not have or maintain any person within the Southern Division of the Northern District of California upon whom service of summons or other process might be made, and has never designated any person within said Southern Division of the Northern District of California, nor within the State of California upon whom service of summons or other process might be made. [8]

(4) Service of summons in this action was attempted to be made on defendant by serving a copy of the original of said summons together with the copy of complaint in said action on Vasiliy A. Haieff, and another copy of the same upon Nicholas N. Ivanoff in the City and County of San Francisco, State of California, on the 4th day of August, 1921, and the return of service of said summons made by the United States Marshal purports to show that it was served on Vasill A. Hayeff and Nicholas N. Ivanoff, each denominated therein as managing agents of defendant.

(5) At the time of the attempted service of summons upon defendant by service of a copy thereof upon said Vasiliy A. Haieff and Nicholas N. Ivanoff, as aforesaid, Vasiliy A. Haieff and Nicholas N. Ivanoff were not and neither of them was the managing or business agent, cashier or secretary nor an officer nor agent of said defendant nor authorized by it to receive or accept service of summons upon it, nor were they nor was either of them at said time engaged in doing any business for, or on behalf of said defendant in said Southern Division of the

Northern District of California, nor in the State of California, excepting that the said Vasiliy A. Haieff had on the second day of August, 1921, and again on the 4th day of August, 1921, attempted to ascertain from Walton N. Moore, president of plaintiff corporation, upon what terms the controversy existing between plaintiff and defendant could be settled or adjusted.

(6) Said Vasiliy A. Haieff and Nicholas N. Ivanoff at the time of the pretended service of summons in this action were both of them only temporary and casually present in the City and County of San Francisco, State of California.

(7) Defendant has not accepted service herein of said summons attempted to be made upon it as aforesaid, nor has it appeared in said action, nor does it now appear herein except hereby [9] and specially for the purpose of this motion.

Defendant has not waived, nor does it now waive due service of summons upon it.

This motion to quash service of summons as aforesaid and to dismiss the above-entitled action is made upon all of the papers and records now on file and of record in the above-entitled action, and upon such other papers and records in said action as may be on file and of record herein at the time of the hearing of said motion, upon the affidavits of Vasiliy A. Haieff and Nicholas N. Ivanoff served and to be filed herein, which affidavits are hereby referred to and by reference made a part hereof, and upon such other evidence, oral and documentary as may be offered upon the hearing of said motion.

WHEREFORE, defendant prays that the alleged service of summons in this action attempted to be made upon it in the manner hereinbefore stated be quashed, annulled, set aside and held for naught, and that the said action be dismissed.

Dated: San Francisco, Calif., August 25, 1921.

COMMERCIAL INDUSTRIAL COMPANY,  
LTD., a Corporation, Successors of J. J.  
CHOORIN & CO., A. V. KASSIA-  
NOFF & CO., Appearing Specially by  
BREWSTER F. AMES, AMBROSE  
GHERINI.

[Endorsed]: Filed August 25, 1921. Walter B.  
Maling, Clerk. [10]

---

(Title of Court and Cause. )

**Notice of Motion to Quash the Alleged Service of  
Summons upon Defendant and to Dismiss Said  
Action.**

To Plaintiff and Messrs. Gregory & Goodell, Its  
Attorneys:

Each and all of you will please take notice that defendant, specially appearing for that purpose and not otherwise, herewith serves upon you, and will file herewith in said action its motion for an order quashing, annulling, setting aside and holding for naught the alleged service of summons and for an order dismissing said action. Defendant accompanies the said motion by a special appearance for the sole purpose of making such motion.

A copy of said special appearance and written motion is hereto attached, made a part hereof, and served herewith.

You will also take notice that the above-entitled Court has made an order attached thereto fixing the hearing of said motion for Monday, the 29th day of August, 1921, at ten o'clock A. M. of said day.

The defendant will call up its motion for hearing at the time fixed in said order, at the courtroom of the above-named court in the Postoffice Building, corner of Seventh and Mission Streets, San Francisco, California, and will present and make the same upon all of the grounds and upon the papers and evidence mentioned in said motion.

Dated: San Francisco, California, August 25th, 1921.

COMMERCIAL INDUSTRIAL COMPANY,  
LTD., a Corporation, Successors of J. J.  
CHORIN & CO., A. V. KASSIA-  
NOFF & CO., Appearing Specially by  
BREWSTER F. AMES, AMBROSE  
GHERINI, Its Attorneys. [11]

Due service of the within notice of motion and receipt of copy is hereby admitted this 25th day of August, 1921.

GREGORY & GOODELL,  
Attorney for Plff.

[Endorsed]: Filed Aug. 25, 1921. W. B. Maling,  
Clerk. [12]



At a stated term, to wit, the July term, A. D. 1921, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the city and county of San Francisco, on Monday, the 17th day of October, in the year of our Lord one thousand nine hundred and twenty-one. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 16,619.

WALTON N. MOORE DRY GOODS CO., INC.,  
vs.

COMMERCIAL INDUSTRIAL CO., LTD.

**Minutes of Court—October 17, 1921—Order Granting Defendant's Motion to Quash Service of Summons, etc.**

Defendant's motion to quash service of summons and to dismiss this action, heretofore heard and submitted, being now fully considered and the Court having filed its memorandum opinion, it is ordered that said motion be, and the same is hereby, granted and that this action be and is hereby dismissed. [13]



At a stated term, to wit, the November term, A. D. 1921, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the city and county of San Francisco, on Monday, the ninth day of January, in the year of our Lord one thousand nine hundred and twenty-two. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 16,619.

WALTON N. MOORE DRY GOODS CO., INC.,  
vs.

COMMERCIAL INDUSTRIAL CO., LTD.

**Minutes of Court—January 9, 1922—Order for  
Judgment, etc.**

Upon motion of B. F. Ames, Esq., attorney for defendant, and it appearing that on October 17, 1921, an order was entered granting the defendant's motion to quash service of summons and dismissing this cause, it is ordered that a judgment of dismissal be entered herein. [14]

---

(Title of Court and Cause.)

**Judgment of Dismissal.**

In this cause the Court having on October 17, 1921, granted defendant's motion to quash service of summons and ordered that this cause be dismissed:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that plaintiff take nothing by this action and that defendant go hereof without day and that said defendant do have and recover of and from said plaintiff its costs herein expended taxed at \$——.

Judgment entered January 9, 1922.

WALTER B. MALING,  
Clerk.

A true copy. Attest:

[Seal] WALTER B. MALING,  
Clerk.

[Endorsed]: Filed Jan. 9, 1922. Walter B. Maling, Clerk. [15]

---

(Title of Court and Cause.)

**Certificate of Clerk U. S. District Court to  
Judgment-roll.**

I, Walter B. Maling, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the above-entitled action.

ATTEST my hand and the seal of said District Court, this ninth day of January, 1922.

[Seal] WALTER B. MALING,  
Clerk.

By J. A. Schaertzer,  
Deputy Clerk.

[Endorsed]: Filed January 9, 1922. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.  
[16]

---

(Title of Court and Cause.)

**(Opinion.)**

GREGORY & GOODELL, of San Francisco, Calif.,  
Attorneys for Plaintiff.

AMBROSE GHERINI, of San Francisco, Calif.,  
Attorney for Defendant.

Motion to quash service of summons and dismiss the action for want of competent service upon defendant, a foreign corporation.

The plaintiff is a New York corporation having a place of business in San Francisco, where it carries on a wholesale dry goods business, and the defendant is a foreign corporation organized under the laws of Russia and doing business at Vladivostock and other points in the state or province of Siberia; the matter in suit grows out of the sale and consignment, some time prior to the bringing of the action, of merchandise by plaintiff in San Francisco to defendant in Vladivostock to be there paid for but the drafts for which were not honored on presentation; and it is alleged "that defendant then and there agreed with plaintiff that plaintiff should retake the said goods and ship the same out of Siberia, and should resell the same and charge the defendant with any loss which might be sustained by plaintiff in said transaction and

which said defendant then and there agreed to pay to plaintiff"; that the consignment was thereupon reshipped to San Francisco by plaintiff and there sold resulting in a loss to plaintiff which defendant has not paid and for which breach the action is brought.

The circumstances under which service in the action was had are these: In April, 1921, one Ivanoff called at the place of business of plaintiff in San Francisco bringing a letter of [17] introduction from the defendant wherein it was stated that the bearer "is our representative for the U. S. A. and Canada" and stated that among other things he was directed to "settle the question about the goods which were shipped from Vladivostock"; the interview of plaintiff with Ivanoff resulted in no adjustment of the demand and the latter proceeded to New York where the defendant maintains an office or place of business; thereafter, about the first of August, 1921, Ivanoff came to San Francisco to meet one Haieff, one of the principal owners or stockholders in the defendant corporation who was arriving from Vladivostock, and on the second of August Ivanoff and Haieff called at the place of business of the plaintiff in an endeavor to settle the matter in dispute between them; no adjustment was accomplished at this meeting and a second conference was held on August 4th with no better success. On this latter date the plaintiff, having in the meantime had the action filed, procured the Marshal to make service of summons upon both Ivanoff and Haieff, the return



reciting as to each that he was served as "managing agent of defendant."

Thereupon the present motion was made. The affidavit of Ivanoff states that he was not at the time of service nor "at any time or at all the the managing or business agent, cashier or secretary, or an officer or agent of aforesaid defendant or authorized by it to receive or accept service of summons upon it"; that he was in San Francisco on the occasion of the service merely temporarily and for the purpose of meeting Mr. Haieff and his daughter, who were Russians and could not speak the English language, in order to assist them and act as their interpreter in the matter of placing Mr. Haieff's daughter in a young ladies boarding school in California and to accompany Mr. Haieff to New York City. The affidavit of Haieff states that he was, on the occasion of the service upon him "only temporarily and casually present in the City and County of San Francisco, State of California, and was not, and am not, present therein for the [18] purpose of transacting business on behalf of defendant or of transacting any business except as hereinafter particularly set forth"; and, after referring to the service of summons upon him states: "I am not now, nor was I at the time of the aforesaid pretended service of summons upon me, or at all, on or about the 4th day of August, 1921, or at any time or at all, the managing or business agent, cashier or secretary or an officer or agent of aforesaid defendant or authorized by it to receive or accept service of summons upon it. After my home



in Blagoveschensk, Russia, had been seized by the Bolsheviks, I, with my wife and children, escaped from Blagoveschensk to Harbin, China, and there decided to send my son Valentine, first, and take my daughter Nadezda later, to the United States for the purpose of placing them in American schools for education, my wife and our remaining children to remain in Russia in accordance with said plan and for the further purpose of improving my health which has been seriously impaired by reason of my previous experiences with the Bolsheviks in Russia; and for no other purpose, except as hereinafter mentioned, I have made this present visit to the State of California with my said daughter. I have entered my said son as a student at the University of California, and my said daughter at Castilleja School at Palo Alto, Santa Clara County, State of California. On or about the 2d day of August, 1921, and again on or about the 4th day of August, 1921, subsequent to all the alleged happenings referred to in the complaint on file herein, I called on Walton N. Moore, president of plaintiff corporation herein, at his office in San Francisco, California, with Nicholas N. Ivanoff, who interpreted for me in the conversation which I then and there held with the said Walton N. Moore, since I have no knowledge of the English language, and I endeavored to ascertain from him upon what terms the controversy existing between plaintiff and defendant could be adjusted in order that I might make a report on the matter." [19]

The affidavit of Walton N. Moore for the plain-

tiff states that Ivanoff and Haieff stated that they were authorized to settle the matter in dispute for the defendant; and there is an affidavit by one Garrissere in behalf of plaintiff to the effect that on August 20, 1921, the defendant purchased of a corporation represented by affiant a consignment of goods to be shipped to the Orient and that in that transaction Ivanoff acted in behalf of and represented himself as the agent of the defendant and that the goods were paid for by him by check drawn on a New York Bank.

It does not appear that either of the parties upon whom service was made had any participation in the making of the contract in question or the transaction out of which it grew or had anything to do therewith other than as above recited; nor does it appear that the defendant at the time of the service had or maintained within this State or District any office or place of business or carried on therein any general business transactions; that apparently the transaction in question was the only one pending at the time between the parties.

VAN FLEET, District Judge:

A foreign corporation can be sued in a jurisdiction other than the State of its creation only when it is at the time doing business therein and maintains there a business or managing agent subject to service of process. Section 411 of the Code of Civil Procedure of the State prescribing the manner of serving process of summons upon a defendant provides for the delivering of a copy thereof as

follows: "If the suit is against a foreign corporation or a nonresident joint stock company or association doing business and having a managing or business agent, cashier or secretary within this State, to such agent, cashier or secretary."

In my view the facts fail to bring the defendant within the statute. It was neither "doing business" within the State nor did it have "a managing or business agent, cashier or secretary" therein within any proper interpretation of its terms. [20] The term "doing business" is used in its broad popular acceptance of meaning and signifies something more substantial than a mere single or isolated transaction arising under a mode of dealing calling for neither a place of business or a local agent. The right of exemption of a foreign corporation from suit in a jurisdiction foreign to the State of its organization is one of substantive value and is not to be taken away by refinements based upon mere casual transactions which do not bring it in some definite substantial way within the ordinary meaning of the language of the statute. This will be found to be the effect of the more recent decisions of the Supreme and Federal courts upon the subject, although there is some diversity of view found in cases from the State courts arising largely out of differences in local statutes.

As stated by Mr. Justice Brandeis in *Phila. & Reading Ry. Co. vs. McKibbin*, 243 U. S. 264: "A foreign corporation is amenable to process to enforce a personal liability, in the absence of consent, only if it is doing business within the State



*in such manner and to such extent* as to warrant the inference that it is present there. And even if it is doing business within the State the process will be valid only if served upon some authorized agent. *St. Louis Southwestern Ry. Co. vs. Alexander*, 227 U. S. 218, 226. Whether the corporation was doing business within the State and whether the person served was an authorized agent are questions vital to the jurisdiction of the court.” (Italics volunteered.) And see, also, *Toledo Rys. vs. Hill*, 244 U. S. 49, and *Peoples Tobacco Company vs. American Can Co.*, 246 U. S. 79.

A like view is taken by the Circuit Court of Appeals of this Circuit in *Doe vs. Springfield Boiler and Manufacturing Co.*, 104 Fed. 684-287, wherein in construing the same section of the code it is said: “Legal service of process upon a corporation which will give a court jurisdiction over it, can be made only in the state where it resides by the law of its creation, or in a [21] state in which it is actually doing business at the time of service, in the manner prescribed by the statutes of that state or of the United States. The question as to what kind of business by a foreign corporation within a state will justify a finding that it is engaged in business therein, and validate a service upon its agent, has been thoroughly and elaborately discussed in the Circuit and Supreme Courts of the United States, and the general consensus of opinion is that the corporation must transact within the state *some substantial part of its ordinary business* by its officers or agents ap-

*pointed and selected for that purpose, and that the transaction of an isolated business act is not carrying on or doing business in a state.” (Italics volunteered.)*

Citing a large number of authorities. And as to the character of the agent upon whom process may be made under the statute it is further said in that case: “The term ‘business agent,’ as used in the statute, does not mean every man who is intrusted with a commission or an employment by a foreign corporation. \* \* \* The statute was never intended to include under the term ‘business agent’ every person who might incidentally or occasionally transact some business for a foreign corporation. Its meaning must be drawn from the general context of the language used. The business agent mentioned in the statute means one bearing a close relation to the duties of managing agent, cashier, or secretary of the corporation. It must be an agent who is appointed, designated, or authorized to transact and manage one or more distinct branches of business, which may be, and is, conducted and carried on by the corporation within the state where the service is made,—one who stands in the shoes of the corporation in relation to the particular business managed, conducted, and controlled by him for the corporation.” The facts here fall far short of meeting plaintiff’s necessities under the principles thus announced. Neither the character of the business or the authority of the agents bring it within the rule. While the agents may have been authorized to [22] settle the mat-



ter in dispute they were not agents of defendant in any general sense. To the same effect, see *Cady vs. Associated Colonies*, 119 Fed. 420-425; *United States vs. American Bell Telephone Company*, 29 Fed. 17-27-41; *Cooper Mfg. Co. vs. Ferguson*, 113 U. S. 727; *Ladd Metals Co. vs. American Mining Co.*, 152 Fed. 1008; *Welch vs. Farmers' Loan & Trust Co.*, 165 Fed. 492.

In *London Machinery Co. vs. American Malleable Iron Co.*, 127 Fed. 1009, it is said: "The defendant has no office, place of business, agent, agency or property in Iowa and never. . . . As yet, I cannot believe that a foreign corporation, having a difference with an Iowa citizen concerning a contract not made in this State surrenders itself to the Iowa courts because an agent with or without authority, comes to this State seeking to adjust such differences. If such be the law, then compromises so much favored by law, are largely at an end as to foreign corporations."

And in *Wilkins vs. Queen City Savings Bk. & Trust Co.*, 154 Fed. 173, it is said: "I do not understand that *Mutual Life Ins. Co. vs. Spratley*, 172 U. S. 602, 19 Sup. Ct. 308, 43 L. Ed. 569, is authority for the proposition that the presence of an officer of a foreign corporation in this state for the purpose of discussing a proposed adjustment of the single controversy between it and plaintiff is sufficient to establish such a 'doing business within the state' as will take the case out of the rule laid down in *Goldey vs. Morning News*, 156 U. S. 518,

15 Sup. Ct. 559, 39 L. Ed. 517, and *Conley vs. Mathison Alkali Works*, 190 U. S. 406, 23 Sup. Ct. 47 L. Ed. 113."

The case of *Premo Specialty Mfg. Co. vs. Jersey Cream Co.*, 200 Fed. 352, from this Circuit, principally relied upon by plaintiff, is readily distinguishable from the case of *Doe v. Springfield Boiler & Mfg. Co.* In the former case the facts showed that the contract sued upon was made and was to be performed in Los Angeles where the suit was brought and that the party upon whom service [23] was made was, at the time, the secretary of the corporation and had come to Los Angeles where he was served, with reference to business transactions theretofore had between the parties, out of one of which the cause of action arose. In the present case it is conceded that the contract sued upon was made and was to be performed at Vladivostock; and that the parties served were neither of them officers of the company in any other respect than that Ivanoff was a general business representative of defendant for Canada and the United States having his headquarters in New York, and had been merely specially requested to ascertain upon what terms the controversy between the parties could be accommodated. It is apparent, therefore, that there is nothing in that case which is at variance or out of harmony with the ruling in the case of *Doe vs. Springfield Boiler & Mfg. Co.*, and no purpose on the part of the Court to ignore or depart from the principles announced

in the latter case can be deduced from anything said in the former.

To hold the defendant amenable to the jurisdiction of this Court under the circumstances presented would, I think, be rather harsh and inequitable as allowing the plaintiff to take advantage of a situation which does not in any substantial respect bring it within the right it invokes.

The motion to quash must be granted and the action dismissed. Such will be the order.

[Endorsed]: Filed Oct. 17, 1921. Walter B. Maling, Clerk. [24]

---

(Title of Court and Cause.)

**Bill of Exceptions.**

BE IT REMEMBERED, that on the 25th day of August, 1921, the above-entitled court gave and made its order reading as follows, to wit:

(Title of Court and Cause.)

ORDER GRANTING LEAVE TO DEFENDANT TO APPEAR SPECIALLY FOR THE PURPOSE OF MOVING TO QUASH THE ALLEGED SERVICE UPON IT OF THE SUMMONS IN THIS ACTION AND TO DISMISS SAID ACTION; ALSO EXTENDING THE TIME OF DEFENDANT TO ANSWER OR PLEAD TO THE COMPLAINT IN THIS ACTION IN THE EVENT THAT SAID MOTION BE DENIED; AND FIXING DAY OF HEARING OF SAID MOTION.

The Court having read the affidavits of Vasiliy A. Haieff and Nicholas N. Ivanoff in the above-entitled action this day filed and good cause appearing therefor, it is ordered that:

Defendant be and it is hereby granted leave to appear in said action specially for the purpose of moving the Court for an order quashing, annulling, setting aside and holding for naught the alleged service of summons in said action attempted to be made upon defendant and dismissing said action.

The time within which defendant may appear herein generally to answer or otherwise plead to the complaint herein is hereby extended and enlarged to and including the 10th day after the entering herein of an order denying the aforesaid motion of defendant in the event that said motion be denied.

Neither the application for, nor the making of, or filing of this order, nor any reliance thereon by defendant, nor the proceedings to be taken, nor the motion to be made to quash service of summons and to dismiss said action shall be deemed or construed to constitute a general appearance by defendant, or waiver by said defendant of any objection to be urged on said motion to quash [25] service of summons or for a dismissal of this action.

The hearing of said motion of defendant is hereby fixed for Monday the 29th day of August, 1921, at ten o'clock A. M. of said day in the courtroom of this Court, in the Postoffice Building, corner of Seventh and Mission Streets, San Francisco, California, and notice of the same shall be served



upon the plaintiff in said action not less than 3 days before the date hereby fixed for said hearing.

Dated: San Francisco, California, August 25th, 1921.

WM. C. VAN FLEET,  
Judge.

That said order bears the following endorsements:

Due service of the within order and receipt of copy is hereby admitted this 25th day of Aug., 1921.

GREGORY & GOODELL,  
Attorneys for Plff.

Filed Aug. 25, 1921. W. B. Maling, Clerk.

That on said 25th day of August, 1921, the defendant filed herein the following special appearance:

(Title of Court and Cause.)

SPECIAL APPEARANCE AND MOTION BY  
DEFENDANT FOR AN ORDER QUASH-  
ING THE ALLEGED SERVICE UPON IT  
OF THE SUMMONS IN THIS ACTION  
AND FOR A FURTHER ORDER DISMISS-  
ING SAID ACTION.

Now comes the defendant herein by Ambrose Gherini and Brewster F. Ames, its attorneys, appearing herein specially for the purpose of this motion, and for no other purpose; and without submitting itself to the jurisdiction of this Court, moves said Court for an order quashing the alleged service upon it of the summons in this action and for a further order dismissing said action upon the following grounds: [26]



(1) Said alleged corporation defendant is not, and never was, a corporation organized or existing under or by virtue of the laws of the State of California, and has not now, and never has had, an office or place of business within the Northern District of California nor elsewhere within the State of California, and has never carried on, conducted nor transacted any business therein.

(2) The contract of sale referred to in the complaint herein was neither entered into, made, nor to be performed, nor was it broken in the Northern District of California, nor elsewhere in the State of California nor in the United States of America.

(3) Defendant does not have or maintain any person within the Southern Division of the Northern District of California upon whom service of summons or other process might be made, and has never designated any person within said Southern Division of the Northern District of California, nor within the State of California upon whom service of summons or other process might be made.

(4) Service of summons in this action was attempted to be made on defendant by serving a copy of the original of said summons together with the copy of complaint in said action on Vasiliy A. Haieff, and another copy of the same upon Nicholas N. Ivanoff in the City and County of San Francisco, State of California, on the 4th day of August, 1921, and the return of service of said summons made by the United States Marshal purports to show that it was served on Vasily A. Haieff and

Nicholas N. Ivanoff, each denominated therein as managing agents of defendant.

(5) At the time of the attempted service of summons upon defendant by service of a copy thereof upon said Vasily A. Haieff and Nicholas N. Ivanoff, as aforesaid Vasily A. Haieff and Nicholas N. Ivanoff were not and neither of them was the managing or business agent, cashier or secretary nor an officer nor agent of said defendant nor authorized by it to receive or accept service [27] of summons upon it nor were they nor was either of them at said time engaged in or doing business for, or on behalf of said defendant in said Southern Division of the Northern District of California, nor in the State of California, excepting that the said Vasily A. Haieff had on the second day of August, 1921, and again on the 4th day of August, 1921, attempted to ascertain from Walton N. Moore, president of plaintiff corporation, upon what terms the controversy existing between plaintiff and defendant could be settled or adjusted.

(6) Said Vasily A. Haieff and Nicholas N. Ivanoff at the time of the pretended service of summons in this action were both of them only temporarily and casually present in the City and County of San Francisco, State of California.

(7) Defendant has not accepted service herein of said summons attempted to be made upon it as aforesaid, nor has it appeared in said action, nor does it now appear herein except hereby and specially for the purpose of this motion.

Defendant has not waived, nor does it now waive due service of summons upon it.

This motion to quash service of summons as aforesaid and to dismiss the above-entitled action is made upon all of the papers and records now on file and of record in the above-entitled action, and upon such other papers and records in said action as may be on file and of record herein at the time of the hearing of said motion, upon the affidavits of Vasilij A. Haieff and Nicholas N. Ivanoff served and to be filed herein, which affidavits are hereby referred to and by reference made a part hereof, and upon such other evidence, oral and documentary as may be offered upon the hearing of said motion.

WHEREFORE, defendant prays that the alleged service of summons in this action attempted to be made upon it in the manner hereinbefore stated be quashed, annulled, set aside and [28] held for naught, and that the said action be dismissed.

Dated: San Francisco, Calif., August 25th, 1921.

COMMERCIAL INDUSTRIAL COMPANY,  
LTD., a Corporation, Successors of J. J.  
CHLOORIN & CO., A. W. KASSIA-  
NOFF & CO., Appearing Specially by  
BREWSTER F. AMES, AMBROSE  
GHERINI, Its Attorneys.

[Endorsed]: Filed Aug. 25, 1921. Walter B. Maling, Clerk.

That on said 25th day of August, 1921, said defendants served and filed a notice in the words and figures following, to wit:

(Title of Court and Cause.)

NOTICE OF MOTION TO QUASH THE AL-  
LEGED SERVICE OF SUMMONS UPON  
DEFENDANT AND TO DISMISS SAID  
ACTION.

To Plaintiffs and Messrs. GREGORY & GOO-  
DELL Its Attorneys:

Each and all of you will please take notice that defendant, specially appearing for that purpose and not otherwise, herewith serves upon you, and will file herewith in said action its motion for an order quashing, annulling, setting aside and holding for naught the alleged service of summons and for an order dismissing said action: Defendant accompanies the said motion by a special appearance for the sole purpose of making such motion.

A copy of said special appearance and written motion is hereto attached, made a part hereof, and served herewith.

You will also take notice that the above-entitled Court has made an order attached hereto fixing the hearing of said motion for Monday the 29th day of August, 1921, at ten o'clock A. M. of said day.

The defendant will call up its motion for hearing [29] at the time fixed in said order, at the courtroom of the above-named court in the Postoffice Building, corner of Seventh and Mission Streets, San Francisco, California, and will present and make the same upon all of the grounds and upon the papers and evidence mentioned in said motion.



Dated: San Francisco, California, August 25th, 1921.

COMMERCIAL INDUSTRIAL COMPANY. LTD., a Corporation, Successors of J. J. CHOORIN & CO., A. V. KAS-  
SIANOFF & CO., Appearing Specially  
by BREWSTER F. AMES, AMBROSE  
GHERINI, Its Attorneys.

[Endorsed]: Due service of the within notice of motion and receipt of copy is hereby admitted this 25th day of Aug., 1921.

GREGORY & GOODELL,  
Attorneys for Plff.

Filed Aug. 25, 1921. W. B. Maling, Clerk.

That on said 25th day of August, 1921, said defendants served and filed two affidavits in the words and figures following, to wit:

(Title of Court and Cause.)

**Affidavit of Nicholas N. Ivanhoff.**

Southern Division of the  
Northern District of California,  
State of California,  
City and County of San Francisco,—ss.

Nicholas N. Ivanoff, being first duly sworn, deposes and says:

I am, and at the time of the pretended service of summons upon me in this action, was, a native citizen and resident of Russia permanently domiciled therein, and temporarily residing [30] in New



York City. I am the person named in the return of the United States Marshal annexed to the summons herein as the person to whom a copy of said summons was handed on the 4th day of August, 1921, as the person upon whom service of summons was attempted to be made.

Said alleged corporation defendant is not, and never was a corporation organized or existing under or by virtue of the laws of the State of California, and has not now, and never has had an office or place of business within the Northern District of California nor elsewhere within the State of California, and has never carried on, conducted nor transacted any business therein.

The contract of sale referred to in the complaint herein was neither entered into, made, nor to be performed, nor was it broken in the Northern District of California, nor elsewhere in the State of California, nor in the United States of America.

I am now, and at the time of the pretended service of summons upon me in this action, was only temporarily and casually present in the City and County of San Francisco, State of California, and was not and am not present therein for the purpose of transacting business on behalf of defendant or of transacting any business except as hereinafter particularly set forth.

On the 4th day of August, 1921, in the City and County of San Francisco, California, a copy of the complaint and a copy of the summons in this action were handed to me by the said United States Marshal, and the return of service of said summons

purports to show that it was served on Nicholas N. Ivanoff, managing agent of defendant.

I am not now, nor was I at the time of the afore-said pretended service of summons upon me, or at all, on or about the 4th day of August, 1921, or at any time or at all, the managing or business agent, cashier, or secretary, or an officer or agent of afore-said defendant, or authorized by it to receive or accept service of summons upon it. [31]

I arrived in San Francisco, California, on the 27th day of April, 1921, subsequent to all the alleged happenings referred to in the complaint on file herein, and called at the office of Walton N. Moore, president of the plaintiff corporation herein, at his office in San Francisco, California, and I endeavored to ascertain from him upon what terms the controversy existing between plaintiff and defendant could be adjusted in order that I might make a report on the matter. The only result of my call upon Mr. Moore was that he mailed a letter to defendant at Vladivostok, Russia, asking for payment of damages alleged in the complaint. I then went to New York City and returned to San Francisco, California, on July 29, 1921, in order to meet Mr. Vasiliy A. Haieff and his daughter Nadezda, both of whom are Russians and have no knowledge whatever of the English language and who arrived in San Francisco on the 31st day of July, 1921, from Siberia, in order to assist them in every possible way and act as their interpreter in the matter of placing Mr. Haieff's said daughter, Nadezda, in a young ladies' boarding-school in

California and to accompany Mr. Haieff later across the United States to New York City.

Thereafter and on or about the 2d day of August, 1921, and again on or about the 4th day of August, 1921, subsequent to all the alleged happenings referred to in the complaint on file herein, I called on Mr. Walton N. Moore, president of the plaintiff corporation herein at his office in San Francisco, California, with the said Vasiliy A. Naieff and interpreters for him in the conversation with the said Walton N. Moore in a second endeavor to ascertain upon what terms the said controversy could be settled or adjusted.

During the latter part of the said conversation held on the 4th day of August, 1921, there was also present Mr. T. T. C. Gregory, counsel for plaintiff herein.

NICHOLAS N. IVANOFF.

Subscribed and sworn to before me this 23d day of August, 1921.

[Seal] JOSEPH PENSA,  
Notary Public in and for the City and County of  
San Francisco, State of California. [32]

[Endorsed]: Due service of the within affidavit and receipt of copy is hereby admitted this 25th day of Aug., 1921.

GREGORY & GOODELL,  
Attorneys for Plff.

Filed Aug. 25, 1921. W. B. Maling, Clerk.

(Title of Court and Cause.)

**Affidavit of Vasilij A. Haieff.**

Southern Division of the Northern  
District of California,  
State of California,  
City and County of San Francisco,—ss.

Vasilij A. Haieff, being first duly sworn, deposes and says:

I am, and at the time of the pretended service of summons upon me in this action, was, a native citizen and resident of Russia, and permanently domiciled therein. I am the person named in the return of the United States Marshal annexed to the summons herein, as the person to whom a copy of said summons was handed on the 4th day of August, 1921, as the person upon whom service of summons was attempted to be made.

Said alleged corporation defendant is not, and never was a corporation organized or existing under or by virtue of the laws of the State of California, and has not now, and never has had, an office or place of business within the Northern District of California nor elsewhere within the State of California, and has never carried on, conducted nor transacted any business therein.

The contract of sale referred to in the complaint herein was neither entered into, made, nor to be performed, nor was it broken, in the Northern District of California, nor elsewhere in the [33]



State of California, nor in the United States of America.

I am now, and at the time of the pretended service of summons upon me in this action, was, only temporarily and casually present in the City and County of San Francisco, State of California, and was not, and am not, present therein for the purpose of transacting business on behalf of defendant or of transacting any business except as hereinafter particularly set forth.

On the 4th day of August, 1921, in the City and County of San Francisco, California, a copy of the complaint and a copy of the summons in this action were handed to me by the said United States Marshal, and the return of service of said summons purports to show that it was served on Vasill A. Hayeff, managing agent of defendant.

I am not now, nor was I at the time of the aforesaid pretended service of summons upon me, or at all, on or about the 4th day of August, 1921, or at any time or at all, the managing or business agent, cashier or secretary or an officer or agent of aforesaid defendant or authorized by it to receive or accept service of summons upon it.

After my home in Blagovschensk, Russia, had been seized by the Bolsheviks, I, with my wife and children, escaped from Blagoveschensk to Harbin, China, and there decided to send my son Valentine, first, and take my daughter Nadezda later, to the United States for the purpose of placing them in American schools for education, my wife and our remaining children to remain in Russia in accord-



ance with said plan and for the further purpose of improving my health which has been seriously impaired by reason of my previous experiences with the Bolsheviks in Russia; and for no other purpose, except as hereinafter mentioned, I have made this present visit to the State of California with my said daughter. I have entered my said son as a student at the University of California, and my said daughter at Castilleja School at Palo Alto, [34] Santa Clara County, State of California.

On or about the 2d day of August, 1921, and again on or about the 4th day of August, 1921, subsequent to all the alleged happenings referred to in the complaint on file herein, I called on Walton N. Moore, president of plaintiff corporation herein, at his office in San Francisco, California, with Nicholas N. Ivanoff, who interpreted for me in the conversation which I then and there held with the said Walton N. Moore, since I have no knowledge of the English language, and I endeavored to ascertain from him upon what terms the controversy existing between plaintiff and defendant could be adjusted in order that I might make a report on the matter.

During the latter part of the said conversation held on the 4th day of August, 1921, there was also present Mr. T. T. C. Gregory, counsel for plaintiff herein.

VASILIIY A. HAIEFF.

Subscribed and sworn to before me this 23d day of August, 1921.

[Seal]

JOSEPH PENSA,

Notary Public in and for the City and County of San Francisco, State of California.

Southern Division of the Northern  
District of California,  
State of California,  
City and County of San Francisco,—ss.

Nicholas N. Ivanoff, being first duly sworn, deposes and says:

I hereby declare that I am competent to interpret from the English language into the Russian language and from the Russian language into the English language. I this day translated the above affidavit of Vasiliy A. Haieff to him into the Russian language before he signed and swore to the same.

NICHOLAS N. IVANOFF.

Subscribed and sworn to before me this 23d day of August, 1921.

[Seal]

JOSEPH PENSA,

Notary Public in and for the City and County of  
San Francisco, State of California. [35]

[Endorsed]: Due service of the within affidavit and receipt of copy is hereby admitted this 25th day of August, 1921.

GREGORY & GOODELL,

Attorneys for Plff.

Filed Aug. 25, 1921. W. B. Maling, Clerk.

That on the 12th day of September, 1921, the plaintiff served and filed two affidavits in the words and figures following, to wit:

(Title of Court and Cause.)

**Affidavit of Walton N. Moore.**

State of California,

City and County of San Francisco,—ss.

Walton N. Moore, being first duly sworn, deposes and says:

That he is now and at all times herein mentioned has been President of Walton N. Moore Dry Goods Co., Incorporated, the corporation above named as plaintiff in said action. That said last-named corporation is now and at all times herein mentioned has been duly incorporated, acting and existing as such under and by virtue of the laws of the State of New York, in the United States of America, and during all of said times was carrying on and conducting business as a wholesale dealer in dry goods and other merchandise therein and in said State of California, and elsewhere, and that said corporation has for the principal place for the conduct of its business in California a place at and in the City and County of San Francisco aforesaid within the said above-entitled district and division.

The defendant corporation and its predecessors, above named, have at all times herein mentioned been duly authorized and existing as a corporation under and by virtue of the laws of the State of Siberia, Russia, and at all the times herein mentioned [36] the said defendant has been doing business as a corporation in the United States and Canada, and holding itself out to be such to all the world and to the affiant.

That during the last three years the defendant has been a customer of the plaintiff corporation, and has purchased large quantities of merchandise therefrom. That on or about the 12th day of August, 1920, plaintiff sold to defendant merchandise of the value of One Hundred Thirty-eight Thousand *Three and* 05/100 Dollars (\$138,003.05), or thereabout, in payment whereof which defendant contracted and agreed to pay to the plaintiff the said value thereof. That the said merchandise was for the account of defendant delivered to the steamships "Ecuador" and "Tenyo Maru" at the port of San Francisco for transportation, and consigned to Vladivostock, Siberia, to defendant.

That as set forth in said complaint defendant was unable to pay for the said merchandise at Vladivostock, and plaintiff was compelled to retake the same and, pursuant to an agreement with defendant regarding the same, to undertake to resell the same and charge any loss which might be sustained in the transaction to defendant, which amount defendant then and there agreed to pay to plaintiff. That a claim against defendant on the part of plaintiff in the amount of Fifty-six Thousand Seven Hundred Fifty-two and 52/100 Dollars (\$56,752.53), arising out of said transaction has been presented by plaintiff to defendant and has, for several months last past, been the subject of negotiations between the said parties.

That early in the month of April, 1921, the defendant advised plaintiff that its representative, one Nicholas N. Ivanoff, would arrive in the United



States, and would confer with plaintiff, and subsequently on or about the latter part of the month of April, 1921, the said Ivanoff arrived and called upon and conferred with affiant, and presented credentials and letters of authority from the defendant, copies of which said letters, then or thereafter received, are attached hereto marked Exhibits "A," "B," "C," "D" and "E," [37] hereby expressly referred to and made a part hereof.

That the said Nicholas N. Ivanoff then and there stated to affiant that he represented the said defendant in the United States and Canada, and that he was specifically authorized and instructed to settle the question respecting the merchandise hereinbefore mentioned, about which said controversy had arisen. That said Ivanoff stated that first of all he desired to effect a settlement and adjustment of all the accounts between the two companies, and particularly the one growing out of the transaction hereinbefore referred to. No settlement was at that time reached between said Ivanoff and affiant, and the said Ivanoff thereafter departed to the City of New York.

That on or about the first day of August, 1921, the said Ivanoff again appeared at the place of business of the plaintiff corporation at and in the said City and County of San Francisco, and called upon me voluntarily, and then and there stated that he had come to San Francisco to meet one Vasiliy A. Haieff, the principal owner and most important factor in the defendant and other associated com-



panies in Vladivostock and Harbin, Manchuria, who has come to San Francisco especially for such purpose and with him to adjust with the plaintiff corporation the difference growing out of the shipment of merchandise to Vladivostock, hereinabove referred to. He thereupon stated that he desired to make an appointment with me for a conference to settle the matter arising from the subject then in dispute between the companies arising out of said shipments, which said conference was arranged for the following morning.

That such conference was held at the office of plaintiff corporation at the appointed time, and said Ivanoff and said Haieff were present. That the said Ivanoff explained that the said Haieff spoke no English and the said conversation was conducted between the said three parties with the said Ivanoff as an interpreter. That the said Haieff thereupon stated to affiant that his principal business in San Francisco, was, with said Ivanoff, [38] to effect an adjustment with affiant of the differences between the two corporations, parties hereto, and to effect such relations between the said corporations as would result in the corporations which he represented buying large quantities of merchandise from the plaintiff above named.

That such conference was not completed upon said day but was continued upon the following day. During the course of such conference the said Haieff stated to me that he was a director of the defendant company, and of its affiliated concerns in Harbin and Vladivostock, and that he was the per-

son who directed the officials of the said corporations.

That the whole matter of the differences between the two corporations arising out of the contract hereinbefore mentioned was discussed between said three parties, but there was no agreement and settlement thereof reached. Thereupon and thereafter *the* close such negotiations the above-entitled action was commenced and service of process made upon the defendant by serving said managing director and agent Haieff and said Ivanoff, managing agent of said defendant.

That the said two parties came into the jurisdiction of the above-entitled court voluntarily and without inducement of any nature or kind by or on behalf of affiant or of plaintiff corporation for the purpose of transacting the above mentioned business of the corporation in the State of California, and within the jurisdiction of this Court, and of transacting other and additional business within this State and the jurisdiction of this Court, and did conduct and carry on such additional business for *and behalf* of defendant in the purchase and shipment of other merchandise from other corporations of the City of San Francisco to defendant's place of business in Siberia.

WALTON N. MOORE.

Subscribed and sworn to before me this 10th day of September, 1921.

[Seal]

H. L. LANFAR,

Notary Public in and for the City and County of  
San Francisco, State of California. [39]

**Plaintiff's Exhibit "A."**

10-th March, 1921.

(Name of Company  
in Russian.)

Messrs. Walton N. Moore Dry Goods Co.,  
7 to 33 Front Street,  
San Francisco, California.

Gentlemen:

This is to introduce our Mr. Nicholai N. Ivanoff, who is our representative for the U. S. A. and Canada.

Hereby we take the liberty to request you to acquaint him with your large organization and also with the market conditions, having in view to prolong our good business relations and fulfilling our orders allow him please to use your kind assistance.

Beside other things we instructed Mr. Nicholai N. Ivanoff to settle the question about the goods, which were shipped from Vladivostock. We feel certain, that the mentioned goods realized by you without a loss and according to the agreement made in Vladivostock you will not request from us any additional charges, that will give us the possibility to work with you in the future, having in view to make interesting purchases on your market.

We handed to Mr. Nicholai N. Ivanoff our agreement for a purpose of formal canceling of same.

Many thanks in advance, we beg to remain Dear  
Sirs

Yours faithfully,

(Signature illegible.)

COMMERCIAL INDUSTRIAL COMPANY,  
LTD.,

Successors of J. J. CHOORIN & CO.,  
A. V. KASSIANOFF & CO.

Exhibit "A." [40]

**Plaintiff's Exhibit "B."**

10-th March, 1921.

I. I. TSCHURIN & CO.,

General Stores.

HARBIN, MANCHURIA,

No. 923.

(Answered Apr. 28, 1921,

W. N. M.)

Messrs. Walton N. Moore Dry Goods Co.,

7 to 33 Front Street,

San Francisco, California.

Gentlemen:

This is to introduce our Mr. Nicholai N. Ivanoff, who is appointed by the Commercial-Industrial Company, Ltd., Successors of J. J. Choorin & Co., A. V. Kassianoff & Co., as a representative in U. S. A. and Canada, and who will establish an office in the name of the above Company and in the name of our House.

As it is know to you, that the above company and our firm are related organizations, financed and managed by the same Board of Directors,



therefore taking in consideration our mutual and friendly co-operation, hereby we beg to ask you to give him your kind assistance in anything, that may occur in time of his presence in the States.

Many thanks in advance, we beg to remain, Dear Sirs,

Yours faithfully,

P. P. I. I. TSCHURIN & CO.

(J. J. CHOORIN & CO.)

(Signature illegible.)

Exhibit "B." [41]

---

**Plaintiff's Exhibit "C."**

Commercial House,

CHLOORIN & CO.

Harbin.

(New City)

Harbin, Mar. 8, 1921.

#226

M K

Messrs. Walton Moore & Co.,

San Francisco, Cal.

Dear Sirs:—

By this we introduce the bearer Mr. Nicholas N. Ivanoff as Attorney in Fact for the Commercial Industrial Co., Ltd., Successors J. J. Choorin & Co., A. V. Kassianoff & Co., who came to America for attending to all kinds of business and opening of an office for buying merchandise as for the above mentioned firm and also for us.



As you know, the mentioned, Commercial Industrial Company and our firm are closely related organizations, financed & directed by the same identical persons, on the ground of that and on the force of our good commercial relations we ask you to show every courtesy to our Mr. Nicholas N. Ivanoff, in all kinds of business matters.

Sincerely thanking you beforehand, we remain with perfect respect,

COMMERICAL HOUSE,

J. J. CHOORIN & CO.

(Signed) A. F. TOPORKOFF,

(Signed) Accountant,

L. SCHARICHEFF.

Exhibit "C." [42]

**Plaintiff's Exhibit "D."**

J. J. CHOORIN CO., INC.

(Commerical Industrial Co., Ltd.

Succ. J. J. Choorin Co. A. V. Kassianoff Co.)

NEW YORK OFFICE:

149 Broadway,

New York City, N. Y.

New York N. Y., May 25, 1921.

Walton N. Moore Dry Goods Co.,

Front & Market St.,

San Francisco, Cal.

(Answered June 1, 1921.

W. N. M.)

Gentlemen:

We have the pleasure to inform you that our New York office is located in the Singer Building

and our Mail address is as follows:

J. J. CHOORIN CO.

149 Broadway,

New York City, N. Y.

Cable Address: CHOORIN, New York.

This is for your information, we are

Very truly yours,

N. IVANOFF,

Atty. in fact.

J. J. CHOORIN Co.

(COMMERICAL INDUSTRIAL CO.,  
LTD.,

Succ. J. J. CHOORIN Co.

A. V. KASSIANOFF CO.)

Enclosure: Original letter and translation. [43]

**Plaintiff's Exhibit "E."**

**"J. J. CHOORIN CO. INC."**

149 Broadway,

New York City,

U. S. A.

June 1, 1921.

Walton N. Moore Dry Goods Co.,

San Francisco, Cal.

Dear Sirs:

By this we take pleasure to inform you that "The Commercial Industrial Co., Ltd., Successors J. J. Choorin Co. A. V. Kassianoff Co. head office Harbin, Manchuria," has established an office for the United States and Canada at Singer Building, 149 Broadway, New York City, N. Y. U. S. A., in the name for brevity sake "J. J. Choorin Co. Inc."

The New York office has been established for the purpose of buying various kinds of merchandise for the general trade in the Far East and for supplying our four large Department Stores which are located in Harbin-Manchuria, Vladivostock, Siberia. Also for the purpose of importing of Raw Furs, especially high class Sable Skins which has been our specialty for many years.

Our firm was established in 1869.

Yours very truly,  
N. IVANOFF,  
J. J. CHORIN CO., INC.,  
COMMERICAL INDUSTRIAL CO.  
LTD.,  
Succ's. J. J. CHORIN CO.  
A. V. KASSIANOFF CO.,  
New York Office.

Exhibit "E." [44]

[Endorsed]: Receipt of a copy of the within affidavit is hereby admitted this 12th day of September, 1921.

BREWSTER F. AMES,  
AMBROSE GHERINI,  
Attorneys for Defendant Appearing for Purposes  
of This Motion Only.

Filed Sept. 12, 1921. Walter B. Maling, Clerk.

(Title of Court and Cause.)

**Affidavit of G. S. Garrissere.**

State of California,

City and County of San Francisco,—ss.

G. S. Garrissere, being first duly sworn, deposes and says:

That he is now and at all times herein mentioned was a resident of the said City and County of San Francisco, and is now and has been during all of the times herein mentioned was Credit Manager of California Central Creameries, a corporation doing business within the State of California, and in said City and County of San Francisco.

That on or about August 20, 1921, Commercial Industrial Company, Ltd., successors of J. J. Choorin & Co., A. V. Kassianoff & Co., defendant above-named and said California Central Creameries, a corporation, had a business transaction at and in said City and County of San Francisco, involving the purchase by said defendant from said California Central Creameries, a corporation by said defendant of certain merchandise consisting of ten (10) tubs of fancy swiss cheese for shipment to the Orient on the S. S. [45] "Persia Maru," consigned to said firm at Harbin, Manchuria. That the said transaction was carried on and conducted on behalf of said defendant by one Nicholas N. Ivanoff, who represented himself to be the agent and representative of the said corporation. That the consideration for said sale was

in money represented by a check in a banking house in New York City, drawn by "Commercial Industrial Company, Ltd., a corporation, successors of J. J. Choorin & Co., A. V. Kassianoff & Co." That said check was paid and the merchandise shipped in due course.

G. S. GARRISSERE.

Subscribed and sworn to before me this 10th day of September, 1921.

[Seal]

H. L. LANFAR,

Notary Public in and for the City and County of  
San Francisco, State of California.

[Endorsed]: Receipt of a copy of the within are hereby admitted this 12th day of September, 1921.

BREWSTER F. AMES,

AMBROSE GHERINI,

Attorneys for Defendant Appearing Specially for  
Purposes of This Motion Only.

Filed Sept. 12, 1921. Walter B. Maling, Clerk.  
[46]

THAT THEREAFTER said motion came regularly on for hearing and was heard upon the complaint, summons, return of service of summons, and the affidavits (copies of which are hereinabove contained) for and on behalf of the parties plaintiff and defendant, and upon all the other documentary proofs hereinabove set forth, and upon said special appearance, order permitting the same, and notice of motion hereinabove contained, and at said hearing said matter was argued for and on behalf of plaintiff and for and on behalf of de-



fendant specially appearing, and thereafter said matter was submitted to the above-entitled Court for decision;

That thereafter, and after consideration and deliberation a written opinion was filed herein by the Judge of said court in which it was stated that the said motion to quash said service of summons must be granted and said action dismissed and that such would be the order.

That thereafter, and on the 9th day of January, 1922, a judgment of dismissal was made and entered herein.

To the order of said Court granting said motion to quash said service of summons and dismissing said action the plaintiff excepted and now excepts and assigns said exception as

PLAINTIFF'S EXCEPTION No. ONE.

To the order of said Court granting said motion to quash said service of summons the plaintiff excepted and now excepts and assigns said exception as

PLAINTIFF'S EXCEPTION No. TWO.

To the order of said Court dismissing said action the plaintiff excepted and now excepts and assigns said exception as

PLAINTIFF'S EXCEPTION No. THREE.

ASSIGNMENTS OF ERROR.

1. The plaintiff claims that the Court erred in granting said motion to quash said service of summons and dismissing said action (hereinabove shown as Exception No. One.) [47]

2. The plaintiff claims that the Court erred in granting said motion to quash said service of summons (hereinabove shown as Exception No. Two).

3. The plaintiff claims that the Court erred in dismissing said action (hereinabove shown as Exception No. Three).

The foregoing constitutes all the proceedings had and taken in the above-entitled matter, and now, within the time required by law and the rules of this Court, said plaintiff proposes the foregoing as and for its bill of exceptions to the rulings, orders and decision of said Court in said matter, and prays that it may be settled and allowed as correct.

Dated: San Francisco, California, January 19, 1922.

GREGORY & GOODELL,  
Attorneys for Plaintiff.

**Stipulation as to the Correctness of Bill of Exceptions.**

IT IS HEREBY STIPULATED that the above and foregoing constitutes a true and correct bill of exceptions in the above-entitled matter and that the same contains all the proceedings had and taken therein and that the same may be settled and allowed as and for the bill of exceptions to the rulings, orders and decision of said Court in said matter. Nothing in this stipulation contained shall be construed to admit any error as specified and assigned under the heading of Assignments of Error, or otherwise.

Dated: San Francisco, California, Feb. 28, 1922.

AMBROSE GHERINI,  
BREWSTER F. AMES,

Attorneys for Defendant Specially Appearing for  
the Purposes of Said Motion.

**Order Settling, Certifying, and Allowing Bill of  
Exceptions.**

The foregoing bill of exceptions now being presented in due time and found to be correct, I do hereby certify that the said [48] bill is a true bill of exceptions and contains all the proceedings had and taken therein and that the same may be settled and allowed as and for the bill of exceptions to the rulings, orders and decision of said Court in said matter.

Dated: San Francisco, California, March 7th, 1922.

WM. C. VAN FLEET,  
United States District Judge, Northern District of  
California.

Receipt of a copy of the within Draft of Proposed Bill of Exceptions hereby admitted this 19th day of January, 1922.

AMBROSE GHERINI,  
BREWSTER F. AMES,

Attorneys for Defendant Specially Appearing for  
the Purpose of the Within Mentioned Motion  
Only.

[Endorsed]: Filed Mar. 7, 1922. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [49]

In the Southern Division of the District Court of  
the United States for the Northern District of  
California, Second Division.

No. 16,619.

WALTON N. MOORE DRY GOODS CO., INCOR-  
PORATED, a Corporation,  
Plaintiff,

vs.

COMMERCIAL-INDUSTRIAL COMPANY, LTD.,  
a Corporation, Successors of J. J. CHOORIN  
& CO., A. V. KASSIANOFF & CO.,  
Defendant.

**Petition for Writ of Error.**

To the Hon. WILLIAM C. VAN FLEET, Judge  
the District Court Aforesaid.

Walton N. Moore Dry Goods Co., Incorporated,  
a corporation, plaintiff above named, feeling ag-  
grieved by the judgment rendered and entered in  
the above-entitled cause in the District Court of  
the United States, in and for the Northern District  
of California, on the 9th day of January, 1922, and  
complaining that in the record and proceedings  
had in said cause, and also, in the rendition and  
entry of said judgment, manifest error has occur-  
red to the great damage of the said plaintiff, as  
more fully appears from the assignment of errors  
which is filed with this petition, comes now and  
petitions the above-entitled Court for an order al-  
lowing said plaintiff to prosecute a writ of error



of the United States Circuit Court of Appeals in and for the Ninth Circuit, and that such writ of error may issue out of the said United States Circuit Court of Appeals for the Ninth Circuit, [50] for the correction of errors so complained of, and that a transcript of the record, proceedings, and papers in this case, duly authenticated may be sent to said Circuit Court of Appeals under and according to the laws of the United States, in that behalf made and provided and for such other and further or different order as to the Court may seem meet.

GREGORY & GOODELL,

Attorneys for Plaintiff.

[Endorsed]: Filed Mar. 6, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [51]

---

In the Southern Division of the District Court of  
the United States for the Northern District of  
California, Second Division.

No. 16,619.

WALTON N. MOORE DRY GOODS CO., INCOR-  
PORATED, a Corporation,

Plaintiff,

vs.

COMMERCIAL-INDUSTRIAL COMPANY,  
LTD., a Corporation, Successors of J. J.  
CHOORIN & CO., A. V. KASSIANOFF &  
CO.,

Defendant.



### **Assignment of Errors.**

Now comes the plaintiff, and plaintiff in error, Walton N. Moore Dry Goods Co., Incorporated, a corporation, and in connection with its petition for a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit, directed to the above-entitled court, says that in the record, the proceedings and the final judgment made and entered in said cause of the 9th day of January, 1922, manifest errors have intervened to the prejudice of the plaintiff and plaintiff in error of which it makes the following assignments, to wit:

#### **I.**

The Court erred in granting the motion to quash the service of summons on Commercial Industrial Company, Ltd., a corporation, successors of J. J. Choorin & Co., A. V. Kassianoff & Co., and dismissing said action.

#### **II.**

The Court erred in granting said motion to quash said [52] service of summons.

#### **III.**

The Court erred in dismissing said action.

#### **IV.**

The judgment entered herein is contrary to law.

WHEREFORE plaintiff and plaintiff in error prays that said judgment be reversed, with directions that the cause be remanded to the Southern Division of the United States District Court for the Northern District of California (Second Divi-

sion), with directions to reverse the said judgment and set the same aside.

GREGORY & GOODELL,  
Attorneys for Plaintiff in Error.

[Endorsed]: Filed Mar. 6, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.  
[53]

---

In the Southern Division of the District Court of  
the United States for the Northern District of  
California, Second Division.

No. 16,619.

WALTON N. MOORE DRY GOODS CO., INCOR-  
PORATED, a Corporation,  
Plaintiff,

vs.

COMMERCIAL-INDUSTRIAL COMPANY,  
LTD., a Corporation, Successors of J. J.  
CHOORIN & CO., A. V. KASSIANOFF &  
CO.,

Defendant.

**Order Allowing Writ of Error.**

On motion of Gregory & Goodell, attorneys for  
plaintiff herein,—

IT IS HEREBY ORDERED that a writ of error  
from the United States Circuit Court of Appeals  
for the Ninth Circuit from the judgment heretofore  
filed and entered herein, be, and the same is hereby  
allowed; that a certified transcript of the record,

affidavits, stipulations, and all proceedings be forthwith transmitted to said United States Circuit Court of Appeals for the Ninth Circuit, and that a citation issue in due course.

IT IS FURTHER ORDERED that the bond on error be fixed at the sum of three hundred dollars.

Dated Mch. 7th, 1922.

WM. C. VAN FLEET,  
Judge of the United States District Court in and  
for the Northern District of California.

[Endorsed]: Filed Mar. 7, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.  
[54]

---

FIDELITY AND DEPOSIT COMPANY OF  
MARYLAND.

Home Office: Baltimore, Maryland.  
Pacific Department Office,  
601 Insurance Exchange Building,  
San Francisco, Cal.

(Title of Court and Cause.)

**Bond on Writ of Error.**

KNOW ALL MEN BY THESE PRESENTS:  
That we, Walton N. Moore Dry Goods Co., Incorporated, a corporation, as principal, and Fidelity and Deposit Company of Maryland, a corporation of the State of Maryland duly authorized to transact the business of indemnity and suretyship in the State of California, and having an office and principal place of business for the State of California in

the City of San Francisco, as surety, are held and firmly bound unto said Commercial-Industrial Company, Ltd., a corporation, successor of J. J. Choorin & Co., A. V. Kassianoff & Co., in the sum of Three Hundred and 00/100 (\$300.00) Dollars, lawful money of the United States, to be paid to it, or its certain attorneys, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves and each of us, our respective heirs, executors and administrators and successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals this 8th day of March, A. D. 1922.

WHEREAS, the above-named Walton N. Moore Dry Goods Co., Incorporated, a corporation, is about to prosecute a Writ of Error to reverse the judgment of the United States District Court for the Northern District of California, Southern Division, rendered against said Walton N. Moore Dry Goods Co., Incorporated, and in favor of Commercial-Industrial Company, Ltd., a corporation, [55] successors of J. J. Choorin & Co., A. V. Kassianoff & Co.

NOW, THEREFORE, the condition of this obligation is such that if the above-named Walton N. Moore Dry Goods Co., Incorporated, a corporation, shall prosecute its said writ of error to effect, and answer all costs if it shall fail to make good its

plea, then this obligation shall be void; otherwise to remain in full force and virtue.

WALTON N. MOORE DRY GOODS CO.,  
INCORPORATED. (Seal)

B. R. FUNSTEN, V. P.

WM. A. RANKIN, Secty.

FIDELITY AND DEPOSIT COMPANY  
OF MARYLAND. (Seal)

By F. E. BRISBINE,  
Attorney-in-fact.

Attest: M. F. CARLETON,  
Agent.

Approved this 8th day of March, 1922.

FRANK H. RUDKIN,  
Judge.

[Endorsed]: Filed Mar. 8, 1922. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [56]

---

In the Southern Division of the District Court of  
the United States for the Northern District of  
California, Second Division.

No. 16,619.

WALTON N. MOORE DRY GOODS CO., IN-  
CORPORATED, a Corporation,  
Plaintiff,

vs.

COMMERCIAL INDUSTRIAL COMPANY,  
LTD., a Corporation, Successors of J. J.  
CHOORIN & CO., A. V. KASSIANOFF &  
CO.,

Defendant.



**Praeceptum for Transcript of Record.**

To the Clerk of said Court:

Sir: Please prepare record on writ of error to United States Circuit Court of Appeals and include therein the following:

Judgment-roll.

Opinion.

Bill of exceptions.

Petition for writ of error.

Assignment of errors.

Order allowing writ of error.

Bond.

Writ of error.

Citation.

GREGORY & GOODELL,  
Attorneys for Plaintiff.

[Endorsed]: Filed Mar. 8, 1922. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [57]

---

In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

No. 16,619.

WALTON N. MOORE DRY GOODS CO., INC.,  
a Corporation,

Plaintiff,

vs.

COMMERCIAL INDUSTRIAL COMPANY,  
LTD., a Corporation, etc.,

Defendant.

**Certificate of Clerk U. S. District Court to Transcript of Record.**

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify the foregoing fifty-seven (57) pages, numbered from 1 to 57, inclusive, to be a full, true and correct copy of the record and proceedings in the above-entitled cause, as enumerated in the praecipe for record on writ of error, as the same remains of record and on file in the office of the clerk of said court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is \$25.90; that said amount was paid by the plaintiff, and that the original writ of error and citation issued in said cause are hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 16th day of March, A. D. 1922.

[Seal]                                      WALTER B. MALING,  
Clerk United States District Court for the Northern  
District of California.     [58]

**Writ of Error.**

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable WILLIAM C. VAN FLEET, Judge of the Southern Division of the District Court of the United States for the Northern District of California, GREETING:

BECAUSE, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, between Walton N. Moore Dry Goods Co., Incorporated, a Corporation, plaintiff *in* error and Commercial Industrial Company, Ltd., a corporation, successors of J. J. Choorin & Co., A. V. Kassianoff & Co., defendant in error, a manifest error hath happened, to the great damage of the said Walton N. Moore Dry Goods Co., Incorporated, a corporation, plaintiff in error, as by its complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspec-

ted, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, the 9th day of March, in the year of our Lord one thousand nine hundred and twenty-two.

[Seal]                      WALTER B. MALING,  
Clerk of the United States District Court for the  
Northern District of California.

By J. A. Schaertzer,  
Deputy Clerk.

Allowed by:

WM. C. VAN FLEET,  
U. S. Dist. Judge. [59]

Receipt of a copy of the within writ of error is hereby admitted this 13th day of March, 1922.

BREWSTER F. AMES,  
AMBROSE GHERINI,  
Attorneys for Defendant.

[Endorsed]: No. 16,619. United States District Court for the Northern District of California, Southern Division. Walton N. Moore Dry Goods Co., Incorporated, a Corporation, Plaintiff in Error, vs. Commercial Industrial Company, Ltd., a Corporation, Successors of J. J. Choorin & Co., A. V. Kassianoff & Co., Defendant in Error. Writ of Error. Filed Mar. 15, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

**(Return to Writ of Error.)**

The answer of the Judge of the District Court of the United States, in and for the Northern District of California, Second Division.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal]

WALTER B. MALING,  
Clerk United States District Court for the Northern  
District of California. [60]

---

**Citation on Writ of Error.**

UNITED STATES OF AMERICA,—ss.

The President of the United States, to Commercial Industrial Company, Ltd., a Corporation, Successors of J. J. Choorin & Co., A. V. Kassianoff & Co., Defendant Herein and to Ambrose Gherini, Esq., and Brewster F. Ames, Esq., Its Attorneys, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within



thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the Clerk's Office of the United States District Court for the Northern District of California wherein Walton N. Moore Dry Goods Co., Incorporated, a corporation, is plaintiff in error and Commercial Industrial Company, Ltd., a corporation, successors of J. J. Choorin & Co., A. V. Kassianoff & Co., is defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM C. VAN FLEET, United States District Judge for the Northern District of California, this 9th day of March, A. D. 1922.

WM. C. VAN FLEET,  
Judge United States District Court. [61]

[Endorsed]: No. 16,619. United States District Court for the Northern District of California, Southern Division. Walton N. Moore Dry Goods Co., Incorporated, a Corporation, Plaintiff in Error, vs. Commercial Industrial Company, Ltd., a Corporation, Successors of J. J. Choorin & Co., A. V. Kassianoff & Co., Defendant in Error. Citation on Writ of Error. Filed Mar. 15, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

Receipt of a copy of the within citation on writ

of error is hereby admitted this 13th day of March, 1922.

BREWSTER F. AMES,  
AMBROSE GHERINI,  
Attorneys for Defendant.

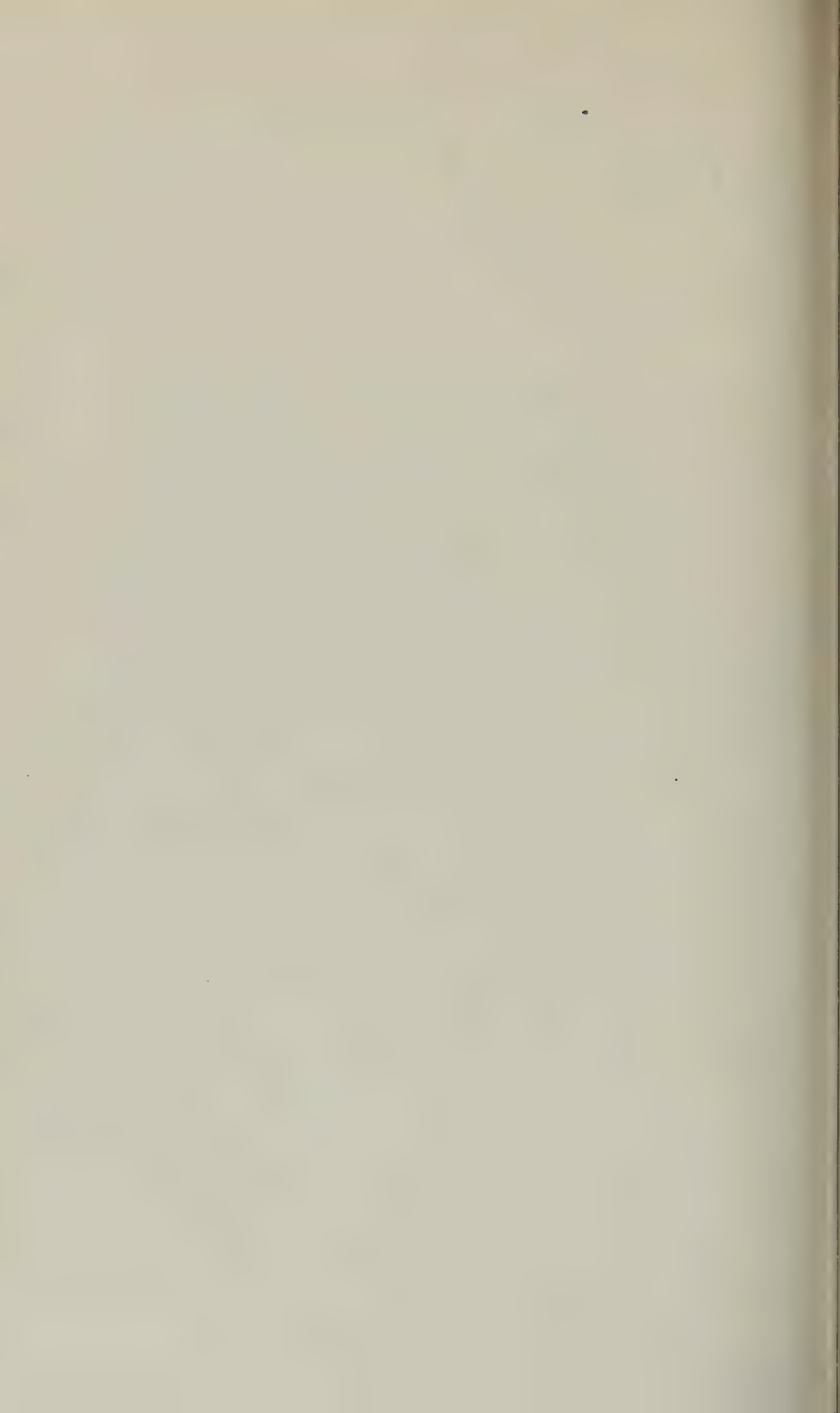
---

[Endorsed]: No. 3848. United States Circuit Court of Appeals for the Ninth Circuit. Walton N. Moore Dry Goods Co., Incorporated, a Corporation, Plaintiff in Error, vs. Commercial Industrial Company, Ltd., a Corporation, Successors of J. J. Choorin & Co., A. V. Kassianoff & Co., Defendant in Error. Transcript of Record. Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

Filed March 25, 1922.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.



No. 3848

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

---

WALTON N. MOORE DRY GOODS CO., INCORPORATED (a corporation),

*Plaintiff in Error,*

VS.

COMMERCIAL INDUSTRIAL COMPANY, LTD. (a corporation), successors of J. J. Choorin & Co., A. V. KASSIANOFF & Co.,

*Defendant in Error.*

---

## BRIEF FOR PLAINTIFF IN ERROR.

---

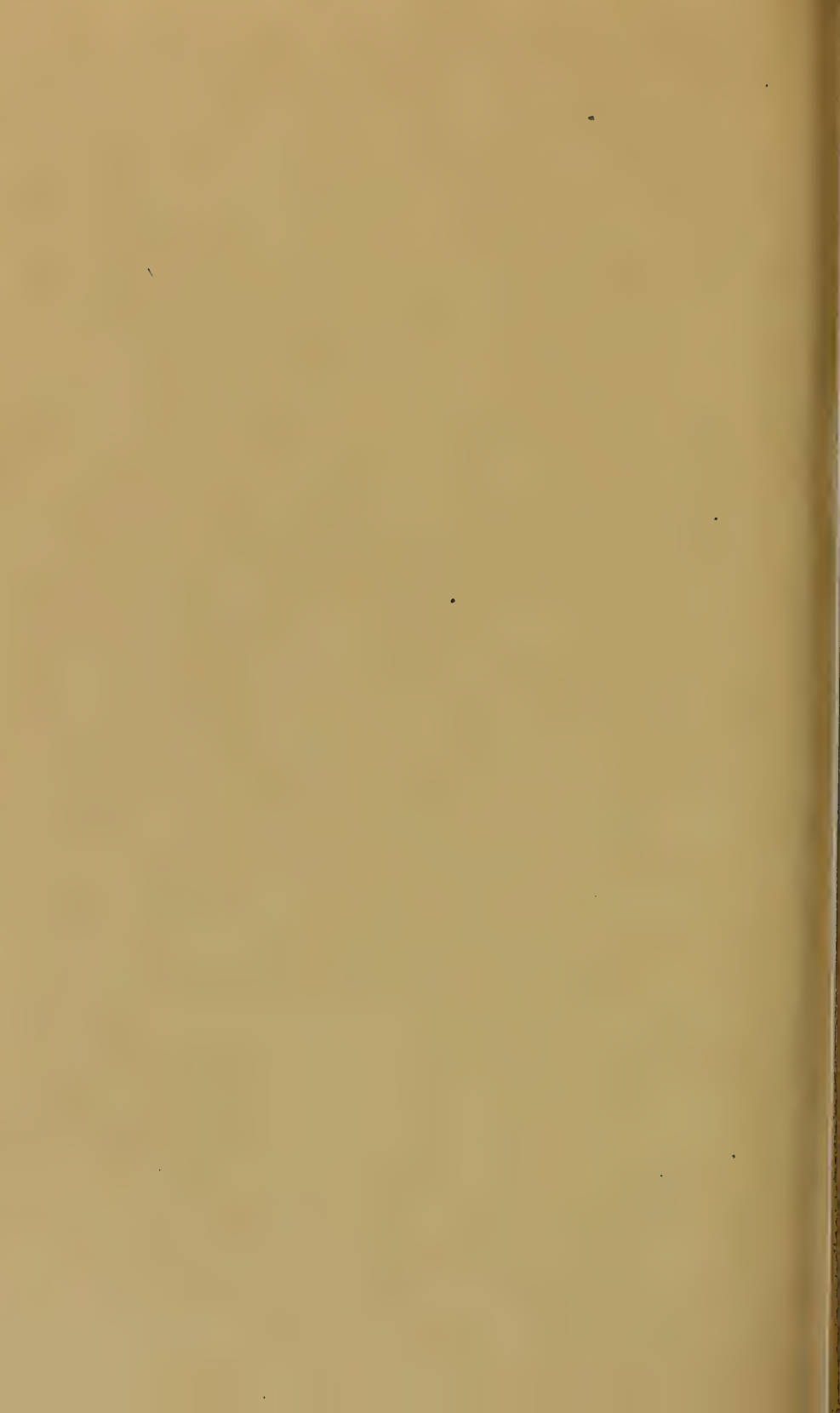
GREGORY & GOODELL,

*Attorneys for Plaintiff in Error.*

FILED

MAY 6 - 1922

F. D. MONCKTON,  
CLERK





No. 3848

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

---

WALTON N. MOORE DRY GOODS CO., INCORPORATED (a corporation),

*Plaintiff in Error,*

VS.

COMMERCIAL INDUSTRIAL COMPANY, LTD. (a corporation), successors of J. J. Choorin & Co., A. V. KASSIANOFF & Co.,

*Defendant in Error.*

## BRIEF FOR PLAINTIFF IN ERROR.

---

### I.

#### Statement of the Case.

This is an appeal from an order granting defendant's motion to quash service of summons and dismissing plaintiff's action, upon which judgment was entered in defendant's favor.

The plaintiff in error is a corporation organized under the laws of the State of New York, with its principal place of business in San Francisco, California, where it conducts a wholesale drygoods busi-

ness. The defendant in error is an alien corporation with its principal place of business at Vladivostok, Siberia. In 1920 defendant in error purchased of plaintiff in error a large quantity of dry goods which were shipped to it at Vladivostok. Upon arrival of these goods Commercial Industrial Company, defendant in error, was unable to make payment for the consignment, and finally the goods were reshipped to the United States, under an agreement by which Commercial Industrial Company undertook to pay any loss sustained by the Walton N. Moore Dry Goods Company, plaintiff in error. The loss occasioned amounted to fifty-six thousand seven hundred fifty-two and  $53/100$  dollars, for which this suit was brought by the Moore Company on August 4, 1921.

On the same day the United States Marshal made service on the defendant in error by delivering a copy of the complaint and summons to Nicholas N. Ivanoff and Vasiliy A. Haieff, Managing Agents of the Commercial Industrial Company at the City and County of San Francisco, State of California.

Thereafter defendant in error appeared specially in the proceeding and filed a motion for an order quashing the service of sumons and for an order dismissing the action. Nicholas N. Ivanoff and Vasiliy A. Haieff filed affidavits in support of the motion, similar in form, stating in substance that the defendant corporation was not organized or existing under and by virtue of the laws of the State of California, had no office nor place of busi-

ness within the Northern District of California, nor elsewhere in the State of California, and had never transacted any business therein; that the contract sued upon was not entered into, to be performed, nor broken in this District, nor in the United States of America. That both of affiants were only temporarily within the State of California and were not present for the purpose of transacting business on behalf of defendant in error; nor were they, or either of them, managing agents nor any other officer or agent of defendant in error or authorized by it to receive or accept service of summons upon it.

The affidavit of Nicholas N. Ivanoff further stated that he was a resident of Russia, temporarily residing in New York City. That he called at the office of Walton N. Moore Dry Goods Co., Incorporated, and consulted Walton N. Moore, President of plaintiff in error, concerning the terms upon which the dispute between the parties could be adjusted in order that he "might make a report on the matter". Later, his affidavit recites, he returned to San Francisco to meet Vasiliy A. Haieff, who arrived in San Francisco with his daughter, in order to act as his interpreter, and accompany him to New York, as he spoke no English. That while in San Francisco he and Mr. Haieff called on Walton N. Moore and he interpreted for them in negotiations "to ascertain upon what terms the said controversy could be settled or adjusted".

The affidavit of Vasiliy A. Haieff set forth that he made the trip to the United States to place his daughter in a school and regain his health, and for no other purpose. He also stated that the purpose of his visit to the office of the plaintiff in error was to ascertain the terms upon which the controversy between the parties could be adjusted so that he could make a report on the matter.

The counter-affidavit of Walton N. Moore contains, among other things, certain letters which the Walton N. Moore Company received in April, 1921, from the defendant in error, specially introducing Nicholas N. Ivanoff *as its representative* for the U. S. A. and Canada. The letter further sets forth among other things—"We instructed Mr. Nicholas N. Ivanoff to *settle* the question about the goods, which were shipped from Vladivostok." etc. \* \* \* (Exhibit A Tr. 47).

Another letter dated March 10, 1921 (Plaintiff's Exhibit B, Tr. 48) addressed to plaintiff in error is to the same effect as to Ivanoff's capacity.

The third letter (Exhibit C, Tr. 49), dated at Harbin, March 8, 1921, addressed to the plaintiff in error is of similar tenor and effect, stating that Nicholas Ivanoff was "Attorney in Fact for the Commercial Industrial Co., Ltd., Successors J. J. Choorin & Co., A. V. Kassianoff & Co., who came to America for attending to all kinds of business and opening of an office for buying merchandise as for the above mentioned firm and also for us",



the writer of the letter setting forth the close relationship of the respective firms.

The fourth letter (Exhibit D, Tr. 50) from Ivanoff to plaintiff in error gave the New York mail address and his cable address.

The fifth letter (Exhibit E, Tr. 51) from New York, signed by the defendant in error, explained the substantial identity of the corporations signing it.

These letters completely support and corroborate the affidavit of Walton N. Moore, who states therein that Ivanoff first came to his office in April, 1921, to advise him that he represented the defendant in error in the United States, and that he was specially authorized and instructed to settle the question respecting the Vladivostok merchandise about which the controversy had arisen, and that on or about the first day of August, 1921, Ivanoff again voluntarily appeared at his place of business and stated that he had come to San Francisco especially for the purpose of adjusting the differences growing out of the shipment of merchandise above mentioned, and asked for a conference to settle the matter as to which defendant in error had specifically authorized and directed him to do. The conference was arranged for the following morning. At the appointed time Ivanoff and Haieff who, as Ivanoff explained, was the principal owner and most important factor in the defendant company, and who had come to San Francisco



especially for the purpose of adjusting with the Moore Company the difference growing out of the shipment of merchandise to Vladivostok, voluntarily appeared in the office of the Moore Company.

Ivanoff, in accordance with defendant in error's letter of March 10, 1921 (Exhibit A), had specific instructions to settle the question about the goods which were shipped from Vladivostok. There is no denial as to any of these facts set forth in Walton N. Moore's affidavit as to the statements made to him by Ivanoff and Haieff respecting their capacities and their purpose in coming to see him and of the purpose of their coming to San Francisco. Mr. Moore did not request either of the two agents of the defendant in error to come into the territory; no inducement was offered to them,—voluntarily and in pursuance of the letters of their company, defendant in error, they called upon and visited Mr. Moore upon the Vladivostok business in an endeavor to settle it.

The counter-affidavit of Walton N. Moore further recited that he received, as stated, a letter in April, 1921, from defendant in error stating that Nicholai N. Ivanoff, its representative, would arrive in the United States to confer with plaintiff in error, following which, Mr. Ivanoff personally presented credentials from defendant in error, which showed him to be the attorney in fact for the defendant in error and appointing him to adjust the dispute which had arisen between the parties, that it placed in Mr. Ivanoff's hands its

agreement for the purpose of formally cancelling the agreement made in Vladivostok by the parties to this action.

In addition to the affidavit of Mr. Moore was an affidavit of G. S. Garrissere, Credit Manager of the California Central Creameries, a corporation, with offices in San Francisco, which stated that Mr. Nicholai N. Ivanoff, representing himself to be the agent and representative of Commercial Industrial Company, on August 20, 1921, conducted some business with his company and purchased from the California Central Creameries ten tubes of fancy Swiss Cheese for shipment to the Orient. That in payment for said purchase Mr. Ivanoff gave a check on a banking house in New York City, drawn by "Commercial Industrial Company, Ltd., a corporation, successors of J. J. Choorin & Co., A. V. Kassianoff & Co.", which check was paid in due course and the merchandise shipped to defendant in error. (Tr. 53.)

After the hearing of the motion to quash service of summons and for the dismissal of the action, the matter was submitted and the learned trial judge held, in a written opinion (Tr. 17) that the defendant in error was not doing business within the jurisdiction of the Court, and, therefore, could not be legally sued in the Northern District of California.

The evidence is conflicting only in this, that the affidavits of Ivanoff and Haieff deny generally

that they, or either of them, are officers of defendant in error, deny that the defendant in error was doing business within the jurisdiction, while the affidavits for the plaintiff in error show specifically the transactions by which Commercial Industrial Company entered into business dealings with Walton N. Moore Dry Goods Co., Inc., and at least one other company in the Northern District of California, and from the statements of both Ivanoff and Haieff, together with letters received from defendant in error, it is clear that they were present in California within the jurisdiction of the Court for the purpose of settling the dispute between the parties and that Haieff was an officer and agent and that Ivanoff was a specially authorized and instructed agent of the Commercial Industrial Company, which specific allegations were not denied by means of affidavits or otherwise. The question is a clean cut one seeking to discover what transactions are necessary to bring an alien corporation within the jurisdiction of the Federal Court.

---

## II.

### **Specification of Errors.**

The assignment of the errors upon which plaintiff in error relies on this appeal will be found on pages 55 and 56 of the Transcript of Record. It is sought to reverse the order and judgment entered for the following reasons:

1. The plaintiff in error claims that the Court erred in granting said motion to quash said service of summons and dismissing said action.

2. The plaintiff in error claims that the Court erred in granting said motion to quash said service of summons.

3. The plaintiff in error claims that the Court erred in dismissing said action.

As all three assignments of error are closely associated, we will consider the points under one group.

---

**NICHOLAI N. IVANOFF SUFFICIENTLY REPRESENTED COMMERCIAL INDUSTRIAL COMPANY IF IT WERE DOING BUSINESS WITHIN THE JURISDICTION.**

The statement of facts shows that Nicholai N. Ivanoff appeared in the office of Walton N. Moore Dry Goods Company after a letter had been written by defendant in error to Walton N. Moore Dry Goods Company, which is set forth in Plaintiffs Exhibit A (Tr. 47). The execution of this letter is not denied, except the blanket denial of Nicholai N. Ivanoff that he was an officer or agent of the defendant corporation. The letter introduces him as "our representative for the U. S. A. and Canada".

However, the letter goes beyond the general authority given him and points to the differences between the two corporations by stating:

*"Beside other things we instructed Mr. Nicholai N. Ivanoff to settle the question about*



*the goods, which were shipped from Vladivostok.* We feel certain that the mentioned goods realized by you without a loss and according to the agreement made in Vladivostok you will not request from us any additional charges, that will give us the possibility to work with you in the future, having in view to make interesting purchases on your market.

“We handed to Mr. Nicholai N. Ivanoff our agreement for a purpose of formal canceling of same.”

If Ivanoff were given authority to adjust a settlement of “the question about the goods, which were shipped from Vladivostok” and was further armed with an agreement for the purpose of cancelling the agreement entered into in Vladivostok prior to that time, and twice called upon Mr. Moore with the same statement of his purpose as appeared in his written authority, can it be held, as the learned trial judge found, that Ivanoff “had been merely specially requested to ascertain upon what terms the controversy between the parties could be accomodated”? (Tr. 26.)

Again, in Plaintiff’s Exhibit C (Tr. 49) Mr. Ivanoff was introduced as

“Attorney in Fact for the Commercial Industrial Company, Ltd., Successors J. J. Choorin & Co., A. V. Kassianoff & Co., who came to America for attending to all kinds of business and opening of an office for buying merchandise as for the above mentioned firm and also for us.”

This, however, was not the only transaction which Ivanoff entered into on behalf of the defendant in



error. The affidavit of G. S. Garrissere (Tr. 53) showed that he entered into another contract, that of the purchase of merchandise on behalf of the defendant in error; that he represented himself to be the agent and representative of the defendant in error and paid for the merchandise by a check drawn by the Commercial Industrial Company, Ltd., a corporation successors of J. J. Choorin & Co., A. V. Kassianoff & Co.

The Court was furnished with proof of at least two transactions on the part of the Commercial Industrial Company in which Mr. Ivanoff participated. His actual agency was unequivocally established by documents of the defendant in error, his own statements, and evidence that not only did he endeavor to settle the controversy with the Walton N. Moore Dry Goods Company, but acted as business agent in this jurisdiction for his company in a transaction distinct from the settlement of the claim of plaintiff in error.

---

**VASILII A. HAIEFF SUFFICIENTLY REPRESENTED COMMERCIAL INDUSTRIAL COMPANY IF IT WERE DOING BUSINESS WITHIN THE JURISDICTION.**

The affidavit of Mr. Haieff stated that the reason for his trip to the United States was to place his daughter in a school and to improve his health which had been shattered by reason of his experiences with the Bolsheviks in Russia. Concerning his dealings with the Walton N. Moore Dry Goods

Company, his only purpose, so his affidavit reads, was to ascertain the terms upon which the controversy existing between the parties could be adjusted in order that he might make a report on the matter. This statement, taken in conjunction with the affidavit of Walton N. Moore, wherein he stated that Ivanoff introduced him as the "principal owner and most important factor in the defendant and other associated companies in Vladivostok and Harbin, Manchuria", (Tr. 44) and Haieff's statement that "he was a director of the defendant company and \* \* \* that he was the person who directed the officials of the said corporations" (Tr. 45), leaves a serious question as to whom Mr. Haieff was to make his report of the result of his negotiations. Ivanoff's statement as to Haieff's status with the company would bind the corporation, irrespective of Haieff's admissions. That Ivanoff made a statement to Mr. Moore is uncontroverted and, if true, establishes the authority of Haieff. In any event, Ivanoff had the power to act for the corporation even if under the direction of one of the principal officials and owners of the company.

---

**NICHOLAI N. IVANOFF AND VASILIIY A. HAIEFF VOLUNTARILY  
ENTERED THE JURISDICTION OF THE COURT.**

The affidavits on file show that the actions of the two representatives of Commercial Industrial Company were not caused by any inducement upon the part of the officials of the plaintiff in error. There is every indication that their action was voluntary

and for the purpose of effecting a settlement of the differences between the parties. No inducements were made by Walton N. Moore Dry Goods Company to bring them within the jurisdiction for the purpose of bringing action against them, but the adjustment of this claim was part of their business dealings as representatives of defendant in error, which they transacted, together with other business, as appears from the affidavit of G. S. Garrissere.

By reason of their voluntary acts on behalf of the defendant in error, they, as business agents, were representatives of the corporation in California, and as pointed out in a following section, the Commercial Industrial Company was "doing business" in the State of California.

---

**AN ALIEN CORPORATION MAY BE SUED WHEREVER IT MAY  
BE VALIDLY SERVED.**

The defendant in error is a corporation organized and existing under the laws of a foreign government, that of Siberia, with its principal place of business in Vladivostok. The plaintiff in error is a corporation existing under the laws of the State of New York with its principal place of business in the City and County of San Francisco and within the jurisdiction of the Court.

Section 24, subdivision 1 of the Judicial Code gives the District Court jurisdiction.

"Of all suits of a civil nature \* \* \* where the matter in controversy exceeds, exclusive of

interest and costs, the sum or value of three thousand dollars and \* \* \* (c) is between citizens of a State and foreign States, citizens or subjects”

(4 Federal Statutes Annotated [2d Ed.], 838.)

If the defendant in error could be validly served in the Northern District of California, the Court would have jurisdiction of the alien corporation, although the contract was not entered into within the jurisdiction, nor was it to be performed here. In *re Hohorst*, 150 U. S. 653; 37 L. Ed. 1211. Although this case involved an infringement of a patent, the Court pointed out the different position held by an alien corporation from that of a corporation organized under the laws of one of the states of the Union.

The Court said:

“Upon deliberate advisement, and for the reasons above stated, we are of opinion that the provision of the existing statute, which prohibits suit to be brought against any person ‘in any other district than that whereof he is an inhabitant’, is inapplicable to an alien or a foreign corporation sued here, and especially in a suit for the infringement of a patent right; and that consequently, such a person or corporation may be sued by a citizen of a state of the Union in any district in which valid service can be made upon the defendant. *Re Louisville Underwriters*, 134 U. S. 488 (33 L. Ed. 991)”.

See also

*Smithson v. Roneo*, 231 Fed. 351;

*H. G. Baker & Bro. v. Pinkham*, 211 Fed. 728.



**DEFENDANT IN ERROR WAS TRANSACTING BUSINESS WITHIN  
THE JURISDICTION OF THE COURT.**

It is the contention of the plaintiff in error that under Section 411 of the Code of Civil Procedure of the State of California which provides for the service of summons on a foreign corporation by the delivery of a copy of the complaint and summons to a managing or business agent, cashier or secretary within the State, valid service may be made on the foreign or alien corporation, in an action upon a contract between the parties, where such officer or agent is in the state expressly to represent his corporation as to such contract, regardless of whether the corporation maintains a regularly established place of business in the State.

An individual may be served in any state where he may be found. A corporation should be entitled to no greater exemption. Particularly should this rule apply to the case of an alien corporation which is doing business with firms or corporations in the United States and in whose own country there may be strife, turmoil and a lack of organized government or judicial institutions and processes for the determination and settlement of controversies. On what basis of reason or public policy should it be held that such a corporation may in the person of its authorized agent enter the state for the purpose of doing business, actually do business there and be immune from service of process which might have reached an individual?

A corporation, whether foreign or alien, should be held to be present in any state to which it sends



its officers or duly authorized agents for the transaction of its corporate business. This would not presuppose that officers or agents of a corporation who were merely passing through a state on pleasure or recreation bent, could by service upon them be the unwilling cause of haling their corporations into the courts of such a jurisdiction. Nor does it mean that even if a corporation sent an agent into a state to do a certain kind or piece of business that the corporation might be brought into Court upon an entirely different matter. But it ought to be, and we believe it is the law, and consonant with the soundest public policy, that a corporation ought to be held to be present in any state to which it sends its officers or agents for the transaction of its corporate business.

Whatever may be said of the presence of Haieff who is one of the directors of the defendant in error and had a controlling part in its management, it is beyond question that Ivanoff had been directly directed by his company "to settle the question about the goods which were shipped from Vladivostok" (Tr. 47). Whether Haieff's presence was merely to determine policy, or to obtain information, or to counsel and advise Ivanoff or the company is entirely immaterial. Ivanoff had the specific power to act, he was not only authorized to do so, he was instructed to do so, and the Walton N. Moore Company was advised of this fact; moreover he actually did attempt to do so and while on one piece of business he did at least one other, evidence of which is before the Court.

Whether the number of business transactions which constitute the doing of business is two or ten is quite immaterial, but it is certain that the corporation in the person of Nicholas Ivanoff was present in the State of California upon business; that it came voluntarily; that the business was the subject of this suit.

There is a well established doctrine in Federal Jurisdictions of the United States that where the manager or authorized officer of a corporation goes into a state on *business of a corporation*, and is there served with process *on account of that business*, such is a valid service of process on the corporation and the Court acquires jurisdiction over it. This was the decision in *Houston et al. v. Filer & Stowell Co.*, 85 Fed. 757. In that case the plaintiffs were residents of Illinois, while the defendant corporation was organized under the laws of Wisconsin. A dispute arising over a contract entered into between the parties, the general manager of the defendant wrote plaintiffs he would be in Chicago on a certain day and confer with them regarding the matter. At the termination of the conference, at which no agreement was reached, the manager of defendant corporation was served with process. This, the District Court held, was a valid service and in the opinion the Court said:

“A corporation is not necessarily found in the county or district merely because one of its general officers may be there, though the officer be its general manager. But when he is in the county or district, *under charge of the corporation*, to do something with respect to the

business upon which the suit is brought, and when his being there is not the result of fraudulent enticement, I can see no reason why service on him is not service upon the corporation, or why the corporation is not, in his person, and during the time covered by his presence for such a purpose, itself present in the county or district. Had the matter been the manager's individually, and the suit been against him individually, there can be no doubt the service, under the circumstances stated, ought to be maintained; but the general manager was, for the time being, in the matter in which he was sent, the corporation, and brought to this county and district the presence of the corporation as effectually as that could be done. The corporation sending him to transact the corporate business was, within the limits of that business, itself present."

To the same effect is the decision in *Brush Creek Coal & Mining Company v. Morgan-Gardner Electric Co.*, 136 Fed. 205. The defendant was an Illinois corporation, which maintained no office or agency in Missouri. Plaintiff placed an order for the construction of an engine with defendant. Trouble arose over a faulty construction. On his return from a business trip, the assistant general manager of defendant stopped off at Kansas City, where the engine was located, for the purpose of adjusting their differences. Judge Amidon in his decision reiterated the reasoning in the *Houston v. Filer* case, *supra*, and went even further in holding that if the officer served were a general officer, the extent of the business transacted in the state was not in issue provided he was there on business of the corporation.

The Court said:

“Much of what is said in this case, goes to the question whether the agent upon whom process was served was of sufficiently high grade so that he could be ‘properly deemed representative of the foreign corporation’. As bearing upon that question, the fact whether the company was actually engaged in business in the state, and the extent of the business committed to the management of the agent, would be material. But if the officer served was a general officer of the corporation, then the extent of the business transacted by him in the state is of no importance in determining the question as to whether he is of an official rank such as to make him properly representative of the company. The precise question under consideration was before the Circuit Court for the Northern District of Illinois in the case of *Houston et al. v. Filer & Stowell Co.*, 85 Fed. 757, and it was there held that, when the manager of a corporation goes into another state on the business of the corporation, service of summons against the corporation in a suit *relating to that business* may be made on him there, although the corporation does not transact business in the state so as to make it an inhabitant thereof. In my judgment, the opinion in this case is a correct exposition of the law. *Any individual may be served in any state where he is found without regard to the place of his residence. A corporation is entitled to no greater exemption.* it ought to be held to be present in any state to which it sends its general officer for the transaction of its corporate business.”

To the same effect are the decisions of a number of State Courts, among which are *Berlin Iron Bridge Co. v. Norton*, 51 N. J. Law 442, 17 Atl. 1079;



Fond du Lac Cheese & Butter Co. v. Henningsen Produce Co., 141 Wis. 70, 123 N. W. 640 and Moulin v. Trenton Mutual Ins. Co., 24 N. J. Law 233.

There is also apparent authority for the contrary position where, however, the officer of the corporation is not authorized to settle the controversy, and some of the Federal jurisdictions have held that an officer of a corporation who comes into a state for the purpose of conferring with reference to a dispute with a resident does not, by that act, "do business" within the meaning of the law. This was held in the case of Louden Machinery Co. v. American Malleable Iron Co., 127 Federal 1008. There, an officer of defendant, an Illinois corporation, went to Iowa to confer with attorneys for plaintiff. At the termination of a conference, defendant's representative stated it would be necessary to submit the matter before the board of directors. He was thereupon served with process. Defendant did no other business there, and the Court held the service on defendant's official was insufficient to confer the jurisdiction of the Courts upon it. It must be stated, however, that the officer had no authority to make a settlement, but could only carry the proposition back to the board of directors.

In this jurisdiction, however, the Circuit Court of Appeals has followed the majority opinion, hereinbefore expressed, and in *Premo Specialty Manufacturing Company v. Jersey-Creme Company*, 200



Federal 352, a case which was argued before Circuit Judges Gilbert, Ross and Morrow, involving virtually the same matters as in the case now before the Court, flatly upheld the position taken by the plaintiff in error in the present case.

The defendant Jersey-Creme Company was a Texas corporation which entered into a contract in Los Angeles for the purchase of aseptic straw dispensers. T. E. Blanchard, the secretary of the defendant corporation was a resident and citizen of Texas. It appeared from the affidavits on file that he visited Los Angeles for the purpose of ascertaining whether a shipment of the straw dispensers was to be made by plaintiff, that being the extent of his authority, and he was not authorized or empowered to transact any other business for the defendant corporation, which had no established business or property within the State of California. After negotiations between the parties, no agreement was reached and Blanchard was served with a copy of summons and complaint concerning the same matter. A motion to quash the service of summons was made on the part of defendant, which was granted by the District Judge. It was held that the actions of Blanchard in coming to California for the purpose of adjusting a contract entered into between the corporations was sufficient to show that the defendant was "doing business" within the meaning of Section 411 of the Code of Civil Procedure of California.

It was there held that

“The service of process upon an agent of a foreign corporation, who comes into the jurisdiction of the court upon the business of the corporation which is the subject of the suit in which service is made, appears to be above all other class of agents the one upon whom service should be made, in order that notice may be promptly given to the corporation, and that it may be fully advised in the premises, and we see no reason why the foreign corporation doing business within the jurisdiction under such circumstances should not be bound by such a service.”

In the Premo Specialty case the contract out of which the controversy arose was made and was to be performed in California, and it is sought to distinguish this case from the one at bar upon this ground. But it must be remembered that the defendant in error is an *alien* corporation; that it may be served anywhere it may be found, and it has been found in the State of California where it was present in the person of its agent Ivanoff doing the business of the corporation. However, the facts are not so widely different. The original contract was a sale by the plaintiff in error, whose principal place of business is in San Francisco, to the defendant in error, at Vladivostok, Siberia, and delivery of the said merchandise was for the account of defendant in error at San Francisco. The goods were delivered to the SS. “Ecuador” and “Tenyo Maru” at the port of San Francisco for transportation, consigned to Vladivostok, Siberia, to defendant in error

(Tr. 43). In the Premo Specialty case it was held that the delivery of goods to a common carrier under a contract for delivery f. o. b. cars was, in effect, a legal delivery to the purchaser, and it was there held that the delivery of the articles mentioned in the contract was therefore made to the defendant in Los Angeles. Here it is set forth that delivery was made at San Francisco for the account of defendants, as indicated. The original contract was therefore executed in California. This contract involved certain payment in due course. When it became impossible to make such payment the original contract was modified by a new one which provided for the retaking of the goods, their removal from Vladivostok to San Francisco and their sale by the plaintiff in error, and thereupon the goods were shipped to the plaintiff in error in San Francisco and were resold in San Francisco at a loss of \$56,752.53 (Tr. 3). While it is true and it is admitted that the supplemental contract was made in Vladivostok, its performance was to be had and was had within the jurisdiction of the Court wherein it provided for the sale and disposition of the merchandise and the payment to the Walton N. Moore Company by the defendant in error, the merchandise having been brought back to San Francisco and sold as agreed.

The only remaining act under the supplementary contract was the payment to the plaintiff in error, presumably at its principal place of business, of the amount of the loss sustained by it, and it was

this precise business, which was necessarily to be performed in San Francisco, that the agent of the defendant in error was specifically directed to settle, and actually and voluntarily entered the jurisdiction for the purpose of complying with these instructions.

The substantial part of the contract and where it was principally to be performed was the sale of the goods in San Francisco, for it was there that the differences in price would reveal themselves upon which the responsibility, if any, of the defendant in error would thereupon accrue.

But it occurs to us that in the case of an alien corporation the fact that the contract was not made or to be entirely performed within the jurisdiction into which the corporation had gone in the person of its authorized agent is not material, for if the particular business connected with the contract upon which the parties were then engaged was being conducted within the State, it would not matter that other parts of the contract which led up to the doing of the particular business in hand might have been or have to be performed in another jurisdiction. Many contracts made in different parts of the world provide for performance in part in different countries and if the criterion of the right to serve and obtain jurisdiction upon an alien corporation doing business with one of the residents within a state of the Union is based upon the necessity of showing performance within the



jurisdiction of *all* the acts to be performed under a contract, or upon the fact that the corporation has an agency therein or is otherwise settled and established, the doctrine of *In re Hohorst* would be negatived and there would be but few cases where jurisdiction over an alien corporation might ever be obtained. Even if such a theory were to be approached it certainly could go no further than to require that the alien corporation to render itself liable for service on an agent must have entered the jurisdiction for the purpose of performing *any part* of the contract, which it was material upon its part to perform, even if other parts of the contract were to be performed in part elsewhere.

The principal point, it seems to us, is whether or not a corporation was legally within the State at the time of service if one of its authorized officers or agents entered the State for the purpose of carrying out or settling any matters connected with the contract, and if such were the case the corporation was personally present as effectually as if it were an individual who had come within the State to discuss the same business in his own behalf, and, within the limits of the particular business in hand, the corporation itself was in precisely the same position.

A corporation which engages in business by sending its representative into the jurisdiction for the purpose of adjusting and settling a difference through another whom it recognizes and authorizes to act as its agent, such as Ivanoff was when he



appeared at the office of the plaintiff in error, must be willing, by reason of the privilege of doing business accorded it, to defend itself by suit even though it is a long distance from its principal place of business. As was stated in the opinion in *Estes et al. v. Belford et al.*, 22 Fed. 275, where an agent of a foreign corporation went into the jurisdiction of New York on the very transaction out of which the suit arose and was served therein:

“This is not any hardship, or, if any, not an undue hardship, upon this defendant, as between it and the orators. It is compelled to answer away from its domicile, but not any further away than it has gone voluntarily by its agents to do that which has given occasion for the process and its service.”

It is our contention that even though Mr. Haieff made the trip to the United States principally for the purpose of placing his daughter in an American school and to regain his lost health, and Mr. Ivanoff for the second time visited San Francisco and the office of Walton N. Moore Dry Goods Company, primarily for the purpose of acting as an interpreter for Mr. Haieff, yet they, in addition thereto, were deputed and acting in the business of effecting a settlement with Walton N. Moore Dry Goods Company by the Commercial Industrial Company. While here they represented their company in its business negotiations, and the company in contemplation of law was present in their persons, doing such business, regardless of the manner in which they occupied themselves before and after the transaction of the business in hand.

**CONCLUSION.**

For the reasons herein given it is respectfully submitted that the order granting defendant's motion to quash service of summons and dismissing the action and the judgment of dismissal should be reversed.

Dated, San Francisco,  
April 29, 1922.

Respectfully submitted,  
GREGORY & GOODELL,  
*Attorneys for Plaintiff in Error.*



No. 3848

IN THE  
**United States Circuit Court of Appeals**  
For the Ninth Circuit

---

WALTON N. MOORE DRY GOODS CO., INCORPORATED, (a corporation),

*Plaintiff in Error,*

VS.

COMMERCIAL INDUSTRIAL COMPANY, LTD. (a corporation), successors of J. J. Choorin & Co., A. V. Kassianoff & Co.,

*Defendant in Error.*

REPLY BRIEF FOR DEFENDANT IN ERROR.

---

AMBROSE GHERINI,  
BREWSTER F. AMES,  
*Attorneys for Defendant in Error.*

FILED

1911

RECEIVED

NOV 1 1911





No. 3848

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

---

WALTON N. MOORE DRY GOODS Co., INCORPORATED (a corporation),

*Plaintiff in Error,*

VS.

COMMERCIAL INDUSTRIAL COMPANY, LTD. (a corporation), successors of J. J. Choorin & Co., A. V. Kassianoff & Co.,

*Defendant in Error.*

---

## REPLY BRIEF FOR DEFENDANT IN ERROR.

---

The statement of facts before the court is clearly set forth in the transcript (Tr. 17). This is an action brought by a New York corporation doing business in this district against a corporation alleged to have been organized under the laws of Siberia, and the complaint alleges that it was broken there.

It appears that the defendant is not, and never was a corporation organized under the laws of this state and that it has never had an office or place of business or property in this district and has never carried on business therein. It further appears that

the parties upon whom the pretended service of summons was made, were only temporarily and casually present in this district, and that neither of them are officers of the defendant, their only connection with the controversy having been an effort to ascertain the terms upon which the controversy existing between the plaintiff and defendant could be adjusted.

It is settled law that a foreign corporation cannot be sued in a jurisdiction other than the state in which it was created, unless it is doing business therein and maintains a business or managing agent subject to service of process.

Plaintiff in error maintains that the "valid service may be made on a foreign or alien corporation, in an action upon a contract between the parties, where such officer or agent is in the state expressly to represent his corporation as to such contract, regardless of whether the corporation maintains a regularly established place of business in the State", also that because "an individual may be served in any state where he may be found, a corporation should be entitled to no greater exemption". This statement is contrary both to the facts in the instant case and the law. Section 411 of the Code of Civil Procedure in setting forth the manner of serving process of summons upon defendants provides

"for the delivery of a copy thereof if suit is against a foreign corporation or a non-resident, joint-stock corporation or association doing business and having a managing or business agent, cashier or secretary within this state; to such agent, cashier or secretary."

By absolutely no process of reasoning can it be successfully urged that the terms of this section apply to defendant in error.

The general and well settled rule of law to be applied on the foregoing statement of facts is clearly stated in the recent cases as follows:

“Where a corporation is not doing business in a state, and the president or any officer is not there transacting business for the corporation and representing it in the state, it cannot be said that the corporation is within the state, so that service can be made upon it.”

Fitzgerald and Mallory Construction Co. v.

Fitzgerald, 137 U. S. 98; 34 L. ed. 608; 11

Sup. Ct. Rep. 36.

See also

Chipman v. Jeffery, 251 U. S. 373; 64 L. ed.

314.

“A long line of decisions in this court has established that in order to render a corporation amenable to service of process in a foreign jurisdiction it must appear that the corporation is transacting business in that district to such an extent as to subject it to the jurisdiction and laws thereof.”

St. Louis S. W. R. Co. v. Alexander, 227 U. S.

217, 227.

All of the following cases decided by the Supreme Court of the United States sustain the foregoing propositions:

The Lafayette Ins. Co. v. French, 18 Howard

404;

St. Clair v. Cox, 106 U. S. 350;

Goldey v. Morning News, 156 U. S. 518;  
 Conley v. Mathieson etc., 190 U. S. 406;  
 Geer v. Mathieson etc., 190 U. S. 428;  
 Peterson v. Chicago, Rock Island & Pac. Ry.  
 Co., 205 U. S. 364;  
 Green v. Chicago, Burlington & Quincy Ry.  
 Co., 205 U. S. 530;  
 Mechanical Appliance Co. v. Castleman, 215  
 U. S. 437;  
 Herndon-Carter Co. v. Norris Son & Co., 224  
 U. S. 496.

With reference to the narrow or particular point involved in this case:

“The defendant has no office, place of business, agent, agency or property in Iowa and never had. It had never done business in Iowa  
 \* \* \* an officer going over the country ‘does not carry the corporation in his pockets’.  
 \* \* \* *As yet, I cannot believe that a foreign corporation, having a difference with an Iowa citizen concerning a contract not made in this state surrenders itself to the Iowa courts because an agent with or without authority, comes to this state seeking to adjust such difference. If such be the law, then compromises so much favored by law are largely at an end as to foreign corporations.*” (Italics ours.)

Loudon Machinery Co. v. American Malleable Iron Co., 127 Federal 1009.

“I do not understand that Mutual Life Ins. Co. v. Spratley, 172 U. S. 602, 19 Sup. Ct. 308, 43 L. ed. 569, is authority for the proposition that the presence of an officer of a foreign corporation in this state for the purpose of discussing a proposed adjustment of the single



controversy between it and plaintiff is sufficient to establish such a 'doing business within the state' as will take the case out of the rule laid down in *Goldey v. Morning News*, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. ed. 517, and *Conley v. Mathieson Alkali Works*, 190 U. S. 406, 23 Sup. Ct. 728, 47 L. ed. 113. The controlling point in the *Spratley* case is stated on page 611 of 172 U. S., page 312 of 19 Sup. Ct. (43 L. ed. 572)."

*Wilkins v. Queen City Savings Bk. & Trust Co.*, 154 Federal 173.

"Following these decisions, as I feel bound to do, the presence of Blandin in Troy, New York, for the purpose of discussing the matter referred to, even if in behalf of the corporation of which he was president, did not subject the corporation to the jurisdiction of the state courts for the purpose of serving the summons in the action; that is he was not transacting business within the meaning of the decisions.

It was not like adjusting losses, etc."

*Ostrander v. Deerfield*, 206 Fed. 544.

"The business done by a foreign corporation must be of such character and extent as to warrant the inference that it has subjected itself to the jurisdiction \* \* \*. In the present case the plaintiff is seeking to bring suit upon a cause of action arising some time before, in connection with transactions in England, between the plaintiff and defendant corporation. To hold that the defendant corporation may be sued in the United States because the managing agent took up certain business for it personally while travelling in this country, instead of conducting that business by letter, is impossible under the authorities.

"If the negotiation or business talks had taken place upon trains between San Francisco



and New York claim might be made that the defendant corporation was doing business in every district through which the train passed."

A foreign corporation may be sued in the Federal courts in any district in which it is found, but not elsewhere.

Smithson v. Roneo, 231 Federal 349.

Plaintiff in error seems to rely mainly upon the case of Premo Specialty Mfg. Co. v. Jersey-Creme Co., 200 Fed. 352; 118 C. C. A. 458; 43 L. R. A. (N. S.) 1015, which arose and was decided in this circuit. In disposing of the contention of plaintiff in error the learned lower court used the following language:

"The case of Premo Specialty Mfg. Co. v. Jersey-Creme Co., 200 Fed. 352; 118 C. C. A. 458; 43 L. R. A. (N. S.) 1015, from this circuit, principally relied upon by plaintiff, is readily distinguishable from the case of Doe v. Springfield Boiler & Mfg. Co. In the former case the facts showed that the contract sued upon was made and was to be performed in Los Angeles, where the suit was brought, and that the party upon whom service was made, was at the time, the secretary of the corporation and had come to Los Angeles where he was served, with reference to business transactions theretofore had between the parties, out of one of which the cause of action arose. In the present case it is conceded that the contract sued upon was made and was to be performed at Vladivostok; and that the parties served were neither of them officers of the company in any other respect than that Ivanoff was a general business representative of defendant for Canada and the United States, having his headquarters in New York, and had been merely specially requested to ascertain upon what terms the controversy

between the parties could be accommodated. It is apparent therefore that there is nothing in that case which is at variance or out of harmony with the ruling in the case of Doe v. Springfield Boiler & Mfg. Co., and no purpose on the part of the court to ignore or depart from the principles announced in the latter case can be deduced from anything said in the former."

We contend that the reasoning of the lower court as above quoted is unanswerable.

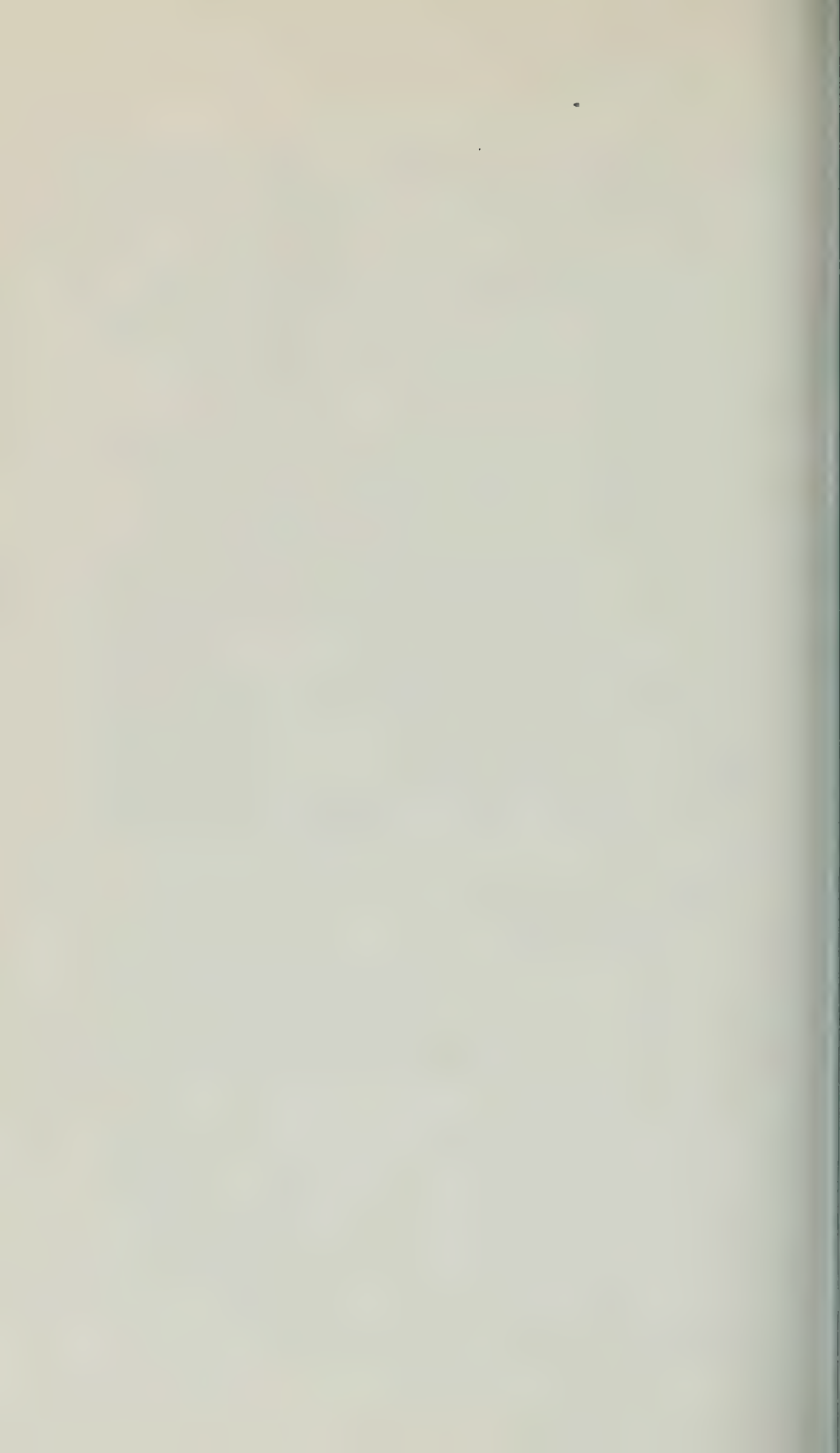
---

#### CONCLUSION.

Since it cannot be found in this district, and the court can acquire no jurisdiction of the subject matter, it is, in conclusion, respectfully submitted that the order of the lower court granting the motion to quash and dismiss the action should be affirmed.

Dated, San Francisco,  
May 8, 1922.

AMBROSE GHERINI,  
BREWSTER F. AMES,  
*Attorneys for Defendant in Error.*



United States  
16  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

---

HARTLAND LAW, EUGENE D. N. E. LEHE, MEL-  
VILLE W. LAWRENCE and H. O. COMSTOCK,  
Copartners, Doing Business as LAWRENCE &  
COMSTOCK, NELLIE COPLAND and JOHN DOE  
COPLAND, Her Husband,  
Plaintiffs in Error,  
vs.

ARTHUR L. SMITH, Dam Gate-Keeper, A. P. DAVIS,  
Chief Engineer and Director, F. G. HOUGH, Late  
Project Superintendent, JOHN F. TRUESDELL,  
Special Assistant to the Attorney General of the  
United States Reclamation Service,  
Defendants in Error.

---

**Transcript of Record.**

---

Upon Writs of Error to the Southern Division of the  
United States District Court of the  
Northern District of California,  
Second Division.

---

FILED  
APR 15 1922  
F. D. MONCKTON





**United States**  
**Circuit Court of Appeals**

**For the Ninth Circuit.**

---

HARTLAND LAW, EUGENE D. N. E. LEHE, MEL-  
VILLE W. LAWRENCE and H. O. COMSTOCK,  
Copartners, Doing Business as LAWRENCE &  
COMSTOCK, NELLIE COPLAND and JOHN DOE  
COPLAND, Her Husband,

Plaintiffs in Error,

vs.

ARTHUR L. SMITH, Dam Gate-Keeper, A. P. DAVIS,  
Chief Engineer and Director, F. G. HOUGH, Late  
Project Superintendent, JOHN F. TRUESDELL,  
Special Assistant to the Attorney General of the  
United States Reclamation Service,

Defendants in Error.

---

**Transcript of Record.**

---

**Upon Writs of Error to the Southern Division of the  
United States District Court of the  
Northern District of California,  
Second Division.**

---



# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

---

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	Page
Affidavit and Order Re Transmission of Records on Appeal. ....	66
Assignment of Errors. ....	37
Bill of Exceptions. ....	28
Bond on Writ of Error. ....	41
Certificate of Clerk U. S. District Court to Transcript of Record. ....	44
Citation on Writ of Error—No. 16,285. ....	48
Citation on Writ of Error—No. 16,287. ....	52
Citation on Writ of Error—No. 16,292. ....	56
Citation on Writ of Error—No. 16,293. ....	60
Complaint. ....	1
Judgment of Nonsuit. ....	20
Minutes of Court—May 31, 1921—Trial. ....	18
Minutes of Court—June 1, 1921—Trial (Continued). ....	20
Minutes of Court—July 11, 1921—Order Denying Motion for New Trial. ....	24
Names and Addresses of Attorneys of Record	1
Order Allowing Writ of Error. ....	40
Order Denying Motion for New Trial. ....	24
Order Extending Time to File Transcript of Record (Dated February 9, 1922). ....	63

Index.	Page
Order Extending Time to File Transcript of Record (Dated March 10, 1922). . . . .	64
Order Settling Bill of Exceptions. . . . .	35
Petition for Allowance of Writ of Error. . . .	36
Plaintiff's Notice of Intention to Move for New Trial. . . . .	21
Praecipe for Transcript on Writ of Error. . .	43
Return to Writ of Error—No. 16,285. . . . .	47
Return to Writ of Error—No. 16,287. . . . .	51
Return to Writ of Error—No. 16,292. . . . .	55
Return to Writ of Error—No. 16,293. . . . .	59
Separate Answer of Arthur L. Smith. . . . .	4
Stipulation Extending Time to File Bill of Exceptions—Dated June 11, 1921. . . . .	25
Stipulation Extending Time to File Bill of Exceptions—Dated June 30, 1921. . . . .	25
Stipulation Extending Time to File Bill of Exceptions—Dated July 19, 1921. . . . .	26
Trial. . . . .	18
Trial (Continued). . . . .	20
Writ of Error—No 16,285. . . . .	45
Writ of Error—No. 16,287. . . . .	49
Writ of Error—No. 16,292. . . . .	53
Writ of Error—No. 16,293. . . . .	57

**Names and Addresses of Attorneys of Record.**

JOHN E. BENNET, Esq., Russ Bldg., San Francisco, Calif., and F. W. SAWYER, Esq., Claus Spreckels Bldg., San Francisco, Calif.,

Attorneys for Plaintiffs.

JOHN T. WILLIAMS, U. S. Attorney, and E. M. LEONARD, Assistant U. S. Attorney, Post-office Bldg., San Francisco, Calif.,

Attorneys for Defendant, A. L. Smith.

---

In the Superior Court of the State of California  
in and for the City and County of San Francisco.

HARTLAND LAW,

Plaintiff,

vs.

ARTHUR L. SMITH, Dam Gate-keeper, A. P. DAVIS, Chief Engineer and Director, F. G. HOUGH, Late Project Superintendent, JOHN F. TRUESDELL, Special Assistant to the Attorney General of the United States, all of the United States Reclamation Service, and Related to the Truckee-Carson Project of Said Service,

Defendants.

**Complaint.**

The plaintiffs sues the above-named defendants and each of them, they and each of them being in the service of the United States, in the Reclama-



tion Service thereof, and at all times herein mentioned in active operation of the Truckee-Carson project in the State of California, and for cause of action says:

I.

That heretofore, to wit, on or about the 30th day of June, 1916, plaintiff was the owner and in the possession of all that tract of land lying and being in the State of California and in the County of El Dorado and described as follows:

A strip of land of uniform depth on the west shore of Emerald Bay, commencing at a point of rock known as Maiden's rock on the west shore of Emerald Bay and extending northeasterly along shore line of said Emerald Bay, three hundred feet with a uniform depth back from said shore line sufficient to contain two acres of land, being a part of lot 1 Section 21, Tsp. 13 N., R. 17 E., M. D. B. & M., County of Eldorado, State of California, with improvements thereon.

II.

That on or about said date defendants and each of them were in possession of and were operating a certain dam at the mouth of Lake Tahoe, in the State of California, which dam was provided with gates capable of controlling the waters and levels of said lake. [1\*] That the defendants then and there shut down said gates, and thereby caused the surface of said lake to raise to a great height, to wit: 6229.80 feet above sea level, as a result of

---

\*Page-number appearing at foot of page or original certified Transcript of Record.

which raise of the lake surface the structures and improvements of plaintiff upon his land were by the action of the waters of said lake washed out and otherwise greatly damaged. The waters of the said lake were by said acts of defendants and each of them raised upon the lands of the plaintiff, and so overflowing did kill and destroy trees and shrubbery thereupon, did wash from said lands soil, and did wreck and demolish structures upon said lands, and did make the dwelling upon said land uninhabitable, and the several structures and excavations thereon unusable, all to the damage of plaintiff in the sum of five thousand dollars.

WHEREFORE plaintiff demands judgment against defendants and each of them in the sum of five thousand dollars.

JOHN E. BENNETT,  
F. W. SAWYER,  
Attorneys for Plaintiff.

State of California,  
City and County of San Francisco.

John E. Bennett, being duly sworn, deposes and says: That he is attorney for the plaintiff in the above-entitled case, that he has read the foregoing complaint and knows the contents thereof and the same is true, except as to the matters which are therein stated on information or belief, and as to those matters he believes it to be true.

That the reason this verification is not made by the plaintiff is because the said plaintiff is not in the city and county of San Francisco, which is where affiant has his office.

JOHN E. BENNETT,

Subscribed and sworn to this — day of June, 1919.

---

Notary Public of the State of California, in and for the City and County of San Francisco. [2]

[Endorsed]: No. 98,538. In the Superior Court of the State of California in and for the City and County of San Francisco. Hartland Law, Plaintiff, vs. Arthur L. Smith et als., Defendants. Complaint—Damages to Property. Filed Jun. 24, 1919. H. I. Mulcrevy, Clerk. By L. J. Welch, Deputy Clerk. John E. Bennett and Frank L. Sawyer, 246 Russ Bldg., San Francisco, Cal., Attorneys for Plaintiff. [3]

[Endorsed]: No. 16,287. In the Southern Division of the District Court of the United States for the Northern District of California, Second Division: Hartland Law, Plaintiff, vs. Arthur L. Smith et al., Defendants. Transcript of Record. Filed September 27th, 1919. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy. United States Attorney, San Francisco, Cal., Attorney for Defendant Arthur L. Smith. [4]

---

(Title of Court and Cause.)

**Separate Answer of Arthur L. Smith.**

Comes now Arthur L. Smith, one of the above-named defendants, by his attorneys, and makes his

separate answer to the complaint herein, as follows:

**FOR A FIRST AND SEPARATE DEFENSE THERETO:**

1. This defendant admits that he is in the Service of the United States, and in the Reclamation Service thereof, and was in such Service at all times mentioned in the complaint, as hereinafter more specifically alleged, but alleges that in the operation of the Truckee-Carson Project, now known at the Newlands Project, active or otherwise, his duties and activities were only as in a later paragraph hereof alleged.

2. As to whether plaintiff herein, on or about the 30th day of June, 1916, or at any time, was, or is, the owner or in possession of all or any part of the land described in paragraph One of the said complaint this defendant has no information or belief sufficient to enable him to answer, and therefore and upon that ground specifically denies each and every allegation in said paragraph one of said complaint.

3. This defendant alleges that he was at the times mentioned in said complaint, and now is employed by the United States in the Reclamation Service thereof, as "gate-keeper," or "gate-tender," in connection with the operation and maintenance of the dam and outlet gates mentioned in said complaint; that at all times mentioned in said complaint and ever since the 4th day of June, 1915, an exclusive and perpetual easement and right of possession, use and enjoyment in said dam and



gates and the property on which they are placed at or near the outlet of Lake Tahoe, a navigable interstate lake lying partly in California and partly in Nevada, [5] was and has been, and now is, owned by the United States, and the said dam and gates were and have been and now are operated and maintained by the United States, all under and in pursuance of the Constitution of the United States, the Act of Congress approved June 17, 1902, (32 Stat. 388), entitled, "An Act Appropriating the Receipts from the Sale and Disposal of Public Lands in Certain States and Territories, to the Construction of Irrigation Works for the Reclamation of Arid Lands," and acts amendatory thereof and supplementary thereto, and other applicable Congressional acts; that said dam and gates were at all of said times and now are being operated and maintained by the United States in connection with and as a part of that certain system of irrigation works, known as the irrigation works of what was formerly called the Truckee-Carson Project, but is now designated as the Newlands Project, constructed and now being constructed, operated and maintained under and in pursuance of said Acts of Congress; that at and during all of said times defendant's duties under said employment, and every act and thing of whatsoever nature done by him in and about said dam and gates, whether they may have caused or contributed to the alleged occurrences, acts or events described in said complaint or otherwise, were and are done and performed under and in



pursuance of said Constitution and laws of the United States and under and in pursuance of the regulations and instructions duly made and promulgated and duly issued to him, through his superior officers thereunto duly authorized, or directly by the Secretary of the Interior, in pursuance of said Constitution and laws and in consistent and lawful accord therewith and authority thereby; that only under the foregoing conditions and limitations was this defendant in possession of or operating said dam and gates, or controlling the waters and levels of said lake at or during any of the times named in said complaint; and except under the foregoing conditions and limitations this defendant denies the allegation in paragraph Two of the complaint that he [6] was in possession of or operating said dam or gates.

4. Denies the allegation in paragraph Two of the said complaint, that this defendant, as in said paragraph alleged, shut down said gates and thereby caused the surface of the lake to rise to the height of 6229.8 feet above sea level, and alleges the fact to be that on or about the 30th day of June, 1916, the surface of the waters of said lake attained the level of 6229.8 feet above sea level and that the gates in said dam were so operated and used under the power and authority, conditions and limitations aforesaid, as to result, in combination with natural causes, in the attainment of said level. Defendant, however, is informed and believes, and on such information and belief avers, that the waters of said lake for a period of more than

thirty-five (35) years, have been regulated and controlled by said dam and gates, as owned and operated by the United States as aforesaid, and by its predecessors in interest long prior to said 4th day of June, 1915, and by an equivalent dam and gates prior to the building of the present structure, and that the present and former dam and gates, instead of causing higher levels on said lake than in a state of nature, have caused, as the same have been used in the storage of water and regulation of said lake, the levels therein to vary both on the high and on the low side in a much less degree than under natural conditions, and to the benefit and advantage of lands riparian to said lake and their owners, including the lands named in the complaint and the owners thereof.

5. Defendant denies that the raising of the lake surface as aforesaid to 6229.8 feet above sea level, or to any height, resulted in damaging greatly or otherwise any or all of the structures or improvements upon said land, or that the same, or any thereof, were washed out or damaged by the action of the waters of said lake or by the raising of the level thereof, or otherwise. Defendant further denies that the waters of said lake, by reason of the rise of the level thereof as aforesaid or otherwise, were [7] raised upon or covered any of the lands of the plaintiff, except that the level of the water along the shore line thereof, which is abrupt at this point, was brought to 6229.8 feet above sea level, and defendant denies that the waters of said lake as alleged in the complaint or

otherwise, did kill or destroy any trees or shrubbery upon said lands or did wash therefrom any of the soil thereof or wreck, demolish or injure structure thereon or make the dwelling upon said land uninhabitable or any less habitable, or any of the structures or excavations on said lands unusable in whole or in part, and denies that the plaintiff was or has been thereby or at all damaged in the sum of Five Thousand Dollars (\$5,000) or in any sum.

AND FOR A SECOND AND FURTHER AND SEPARATE DEFENSE THIS DEFENDANT ALLEGES:

That plaintiff's pretended cause of action is barred by the provisions of Section 318 of the Code of Civil Procedure of the State of California.

AND FOR A THIRD AND FURTHER AND SEPARATE DEFENSE THIS DEFENDANT ALLEGES:

That plaintiff's pretended cause of action is barred by the provisions of Section 319 of said Code of Civil Procedure.

AND FOR A FOURTH AND FURTHER AND SEPARATE DEFENSE THIS DEFENDANT ALLEGES:

That plaintiff's pretended cause of action is barred by the provisions of Subdivision 1 of Section 339 of said Code of Civil Procedure.

AND FOR A FIFTH AND FURTHER AND SEPARATE DEFENSE THIS DEFENDANT ALLEGES:

That all acts and things done and performed by him in and about the dam and gates mentioned in said complaint, at all the times mentioned therein and at all other times, were done and performed by him as an employee, agent and officer of the United States in pursuance of instructions and regulations duly and [8] legally issued to him under the Constitution and laws of the United States, as more fully described in paragraph 3 of his first defense herein; that he is informed and believes, and on such information and belief avers, that the United States and the Secretary of the Interior, whether acting through or by defendant, or otherwise, have, and at all times mentioned in said complaint have and have had the full right and power to raise the level of Lake Tahoe to more than the elevation 6229.8 feet above sea level as against plaintiff, not only because of the authority granted and set out in such Constitution and laws, and particularly those relating to arid lands as aforesaid, but also because of the fact that the United States through itself and its predecessors in interest, has acquired and now owns the right, privilege and easement to regulate said lake, and to raise the level thereof to said elevation 6229.8 feet above sea level, and indeed to a higher level, by prescription as against plaintiff and the lands described in the complaint, and to overflow said lands by that means, in that it and they have so regulated said lake continuously and raised the level of said lake to said elevation and more, in and upon the lands described in said complaint,



and against and adversely to the owners thereof and all those having an interest therein, including the plaintiff and *and* his predecessors in interest, and have in that way and by that means overflowed said lands continuously and whenever required in connection with its and their storage operations and regulation of said lake, for a period of more than five (5) years prior to the commencement of this action, and for a period of more than five (5) years prior to the date set forth in the complaint herein of the alleged injury to plaintiff's lands; and during all of said period it and they have been in the actual occupation, possession, use and enjoyment of said right, privilege and easement, openly, notoriously and peaceably and not [9] clandestinely, and adversely and in hostility to plaintiff's title and claim of title and under a claim of right and title exclusive of any other right and as its and their own and with notice to, and with the knowledge of, plaintiff and his grantors and predecessors in interest, and uninterruptedly and continuously in connection with its and their storage operations and regulation of said lake; and that by reason of the matters and things aforesaid no recovery can be had against this defendant, nor can he be personally held for damages herein.

AND FOR A SIXTH AND FURTHER AND SEPARATE DEFENSE THIS DEFENDANT ALLEGES:

That he is informed and believes, and on such information and belief avers, that the United



States, under and in pursuance of the Constitution and laws thereof, by so raising the level of said lake in the month of June, 1916, to said elevation of 6229.8 feet above sea level, did take and appropriate, and did thereafter use and enjoy an easement over said land, or a special use thereof, to the extent marked by said elevation; and under and in pursuance of the Constitution and laws of the United States aforesaid, any recovery by plaintiff, if any can be had in that relation, for such taking and appropriation, must be from and against the United States, in a suit under the statute in that case provided, and not against defendant, whose acts and undertakings as aforesaid, were done and performed in pursuance of regulations and instructions duly issued and promulgated by his superiors in office, and as an agent or employee of the United States, and were the acts of the United States under the law, and not the personal acts of this defendant.

AND FOR A SEVENTH AND FURTHER AND SEPARATE DEFENSE THIS DEFENDANT ALLEGES:

That heretofore, to wit, on or about the 4th day of August, 1908, suit was instituted in the Superior Court of the State of [10] California, in and for the County of Placer, entitled M. Lawrence and H. O. Comstock, etc., against Murry F. Vandall, et al., defendants, No. 3966.

That the plaintiffs in said suit in effect and substance alleged, among other things, that during all the times mentioned in the complaint in said suit,

they were the owners of those certain tracts of land in said complaint described, bounding upon Lake Tahoe and situate and lying in Eldorado County, California, together with the improvements thereon; that defendants in said suit, on or before the 23d day of October, 1902, constructed across the mouth (meaning outlet) of said Lake Tahoe, a certain dam extending to the height of ten (10) feet above the "natural and low water level" of said lake and had ever since maintained and did maintain at the time of the institution of said suit, said dam in the position aforesaid; that by reason of said dam the waters of said Lake were prevented from flowing out of said Lake and were held back within said Lake, and the surface thereof was raised above its "natural and normal" level to a great height, to wit, ten (10) feet; that by reason of the raising of the Lake by said defendants, the building upon said lands in Emerald Bay was damaged, the carpets on the floor therein were wetted and destroyed, the furniture therein was wetted, warped and swollen, the underpinning of said house was injured and plaintiffs were prevented from letting the said house and premises during the seasons of 1906 and 1907; that the total damage thereto in all amounted to Seven Thousand Dollars (\$7000), and said plaintiffs were damaged to that amount.

That said lands described in said complaint embrace and include and in part are, the identical lands described in the complaint herein, to wit:

“a strip of land of uniform depth on the west shore of Emerald Bay, commencing at a point of rock known as Maiden’s rock on the west shore of Emerald Bay and extending north-easterly along [11] shore line of said Emerald Bay, three hundred feet with a uniform depth back from said shore line sufficient to contain two acres of land, being a part of lot 1, Section 21, Tp. 13 N. R. 17 E., M. B. & M., County of Eldorado, State of California.”

That the United States has acquired from said defendants in said suit, mediately or immediately, and at all times mentioned in the complaint herein and prior thereto was and ever since said times has been, and now is the owner of said dam and the gates thereof and the right to regulate the same and to regulate the aforesaid Lake thereby, and all the rights, privileges and immunities of said defendants under and by virtue of their ownership and operation of said dam and gates and regulation of said Lake, and including those inuring to said defendants under and by virtue of the judgment entered in said suit, the character and effect of which said judgment is hereinafter alleged.

That defendant herein is informed and believes, and on such information and belief avers, that such right or title to said lands hereinabove last described as the plaintiff herein has acquired and now owns, if any he has, has been acquired from the plaintiffs in said suit subsequent to the commencement thereof and is subject to all the liabilities, easements and servitudes attached and inci-

dent to said lands under and by virtue of said judgment.

That the aforementioned suit was adjusted and settled by stipulation between the parties and a judgment dismissing the same was duly entered thereon on November 21, 1908, in said court of competent jurisdiction, which said judgment was explicitly described and designated, and in fact was, a judgment on the merits in said suit;

That the issues presented herein as to the right of the defendant (heretofore alleged to be acting solely as a representative, agent and officer of the United States) and as well the right of the United States to regulate said Lake over and upon said lands by means of said dam and to overflow said lands and cause the water to [12] stand thereon at an elevation of 6229.8 feet above sea level, as alleged in the complaint herein, are included in those issues arising in the earlier action aforesaid, and that the judgment in said last-named action in its dismissal of the claim for damages and confirmation of the right of the predecessors in interest of the United States, among other things, to overflow said lands to the height alleged in the complaint in said action, which said height was greater than that alleged in the complaint herein, constitutes and perforce must be held to be an estoppel against plaintiff herein and does estop him from demanding or recovering any damages for such overflowing of said lands or injury thereto or the improvements thereon; and that defendant herein, acting within said right of the United States and



as its representative, agent and officer, cannot be recovered against for any acts or things done by him in that relation in respect to said lands, and further, that the matters in controversy in said suit have been finally adjudicated by the said judgment of said Superior Court in an action based on an alleged injury of a permanent character, and that the plaintiff herein ought not to be heard to allege anything contrary thereto in respect to said lands.

WHEREFORE, defendant prays that plaintiff take nothing by this action, and that same be dismissed and held for naught, and that defendant have and recover of plaintiff his costs and disbursements in this behalf sustained.

FRANK M. SILVA,  
United States Attorney.

E. M. LEONARD,  
Assistant United States Attorney.

H. A. COX,  
District Counsel, Reclamation Service.

DAVID A. PINE,  
Special Assistant to the Attorney General,  
Arthur L. Smith, [13]  
Attorneys for Defendant,

United States of America,  
Northern District of California,  
City and County of San Francisco,—ss.

E. M. Leonard, being first duly sworn, deposes and says: That he is Assistant United States Attorney in and for the Northern District of California and as such is one of defendants' attorneys



in this action; that he has read the foregoing answer and knows the contents thereof; that he is informed upon reliable information that the contests thereof is true and therefore affirms that the same is true except as to matters therein stated on information and belief and that as to those he also believes it to be true; and that the reason this verification is not made by plaintiff is that he is not within the County of San Francisco, which is the county wherein this affiant resides.

E. M. LEONARD.

Subscribed and sworn to before me this 1st day of February, 1921.

[Seal]

WALTER B. MALING,

Clerk U. S. District Court, Northern District of California.

Received copy of the within answer the 1st day of February, 1920.

JOHN E. BENNETT,

Attorney for Plaintiff.

[Endorsed]: Filed Feb. 2, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [14]

---

At a stated term, to wit, the March term, A. D. 1921, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the city and county of San Francisco, on Tuesday, the 31st day of May, in the year of our Lord one thousand nine hundred and twenty-one. Present The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 16,285.

MELVILLE W. LAWRENCE et al.

vs.

ARTHUR L. SMITH.

No. 16,287.

HARTLAND LAW

vs.

ARTHUR L. SMITH.

No. 16,292.

EUGENE D. N. E. LEHE

vs.

ARTHUR L. SMITH.

No. 16,293.

NELLIE COPLAND et al.

vs.

ARTHUR L. SMITH.

**Minutes of Court—May 31, 1921—Trial.**

These causes came on regularly this day for trial, John E. Bennett, and F. W. Sawyer, Esqrs., appearing as attorneys for plaintiffs and E. M. Leonard, Asst. U. S. Attorney, and H. A. Cox, Brooks Fullerton and George A. H. Fraser, Esqrs., appearing on behalf of defendant. It appearing that the alleged cause of damage in the four above actions is a cause common to all; it is ordered that these causes be consolidated for trial. Thereupon the following named persons, to wit:

- |                      |                      |
|----------------------|----------------------|
| 1. James R. Eubanks  | 7. Paul V. Harris    |
| 2. George J. Wallace | 8. Frank M. Farrell  |
| 3. Ray W. Simonds    | 9. N. B. Livermore   |
| 4. Walter S. Leland  | 10. Thos. H. Haskins |
| 5. R. C. Franke      | 11. W. T. Wood       |
| 6. John S. Wilson    | 12. A. Aronson       |

[15]

twelve good and lawful jurors, were, after being examined under oath by counsel; accepted and sworn to try the issues joined herein. Mr. Bennett made the opening statement on behalf of plaintiffs and Mr. Leonard made the opening statement on behalf of defendant. Dr. Hartland Law was sworn and testified on behalf of plaintiffs and plaintiffs introduced in evidence and filed their exhibit marked "1." On cross-examination the defendant introduced in evidence and filed his exhibit marked "A." Ordered that the further trial be continued to to-morrow morning at ten o'clock and the jury, after being admonished by the Court, were excused until that time. [16]

---

At a stated term, to wit, the March term, A. D. 1921, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the city and county of San Francisco, on Wednesday, the 1st day of June, in the year of our Lord one thousand nine hundred and twenty-one. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

(Title of Causes.)

**Minutes of Court—June 1, 1921—Trial (Continued).**

The parties and the jury being present as heretofore the trial was resumed. H. O. Comstock was sworn and testified on behalf of plaintiffs; and plaintiffs rested. Mr. Leonard moved for judgments of nonsuit and after arguments by counsel the motions *was* submitted and being fully considered it was ordered that said motions be granted and that judgments of nonsuit be entered in the above causes. Ordered that the jury be discharged from further consideration herein. Upon motion of Mr. Leonard it was ordered that each side may withdraw their exhibits. [17]

---

(Title of Court and Cause.)

**Judgment of Nonsuit.**

This cause having come on regularly for trial on the 31st day of May, 1921, being a day in the March, 1921, term of said court, before the Court and a jury of twelve men duly impaneled and sworn to try the issue joined herein; John E. Bennett and F. W. Sawyer, Esqrs., appearing as attorneys for plaintiff and E. M. Leonards, Assistant United States Attorney, H. A. Cox, Brooks Fullerton and George A. H. Fraser, Esqrs., appearing on behalf of defendant; and the trial having been proceeded

with on the first day of June in said year and term and oral and documentary evidence having been introduced on behalf of plaintiff; and the attorney for defendant having thereupon moved the Court for a judgment on nonsuit and the Court, after hearing arguments of the respective parties upon said motion and after full consideration thereof, having ordered that said motion be granted and that a judgment of nonsuit be entered herein; with costs to the defendant:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that plaintiff take nothing by this action; that judgment of nonsuit be and is hereby entered against said plaintiff herein; that the defendant go hereof without day; and that said defendant do have and recover of and from said plaintiff his costs herein expended taxed at \$23.74.

Judgment entered June 1, 1921.

WALTER B. MALING,  
Clerk. [18]

---

(Title of Court and Causes.)

**Plaintiff's Notice of Intention to Move for New Trial.**

To the Defendant Smith Herein, and to E. M. Leonard, Esq., Assistant District Attorney of the United States, His Attorney,

The plaintiff in the above-entitled consolidated cases hereby gives notice of intention to move for a new trial in the above-entitled cases, and for an



order of Court vacating the verdict and setting aside the judgment entered herein, and granting thereupon plaintiffs a new trial in the above-entitled actions, for the following cause:

Error in law occurring at the trial.

That the said error consisted in this: That during the said trial, and during the examination by plaintiff of a witness for plaintiff the purpose of which testimony was to show damage done to plaintiff's land by the act of defendant in raising the waters of said lake through the means of said dam, the defendant thereupon objected to the introduction of any testimony by plaintiff tending to prove any damages upon plaintiff's lands because of the act of defendant in raising the waters of the said lake to the height of 6229.8 through the handling by defendant of the said dam as occurring during the year 1916, on the ground that damages occurring to plaintiff's lands or structures thereon or otherwise occurring during the year 1916 were barred by the statute of limitations of the State of California, being section 339 of the Code of Civil Procedure of said state, suit for such damages being, as contended by defendant in the nature of an action of trespass on the case, and by reason of said section of said Code of Civil Procedure expired in two years from and after the commission of said act, which occurred in June 30th, 1916, suit thereon not having been filed by plaintiff until June 24th, 1919.

That the Court thereupon sustained the said objection and [19] thereupon a nonsuit of plain-

tiff was granted by the Court to which plaintiff excepted, whereupon the jury under instructions of the Court rendered a verdict for defendant and judgment on said verdict was thereupon entered, subject to the right of plaintiffs to make this motion for new trial before the same shall have become final.

And plaintiff says that the Court in so ruling committed an error of law, in that the said act of defendant as plaintiff contends and alleges, was not trespass on the case, but trespass, and the action was not barred by section 339 of said Code of Civil Procedure as expiring in two years after said 30th day of June 1916, but was barred only by Section 338 of said Code of Civil Procedure which provides three years for the bringing of such action, said act of defendant being and constituting a trespass upon real property of plaintiffs.

WHEREFORE by reason of said error of the Court in so ruling upon the law in said case, plaintiff makes this his motion for a new trial and serves notice upon defendant of his intention to move for a new trial, and petitions the Court that the judgment and verdict herein entered may be set aside and that he may have a new trial hereon.

JOHN E. BENNETT,  
F. W. SAWYER,  
Attorneys for Plaintiffs.

Service of within and receipt of copy hereby admitted this 9th day of June, 1921.

FRANK M. SILVA,  
U. S. Atty.,  
E. M. LEONARD,  
Asst. U. S. Atty.,  
Attorneys for Defendants.

[Endorsed]: Filed Jun. 10, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.  
[20]

---

At a stated term, to wit, the July term, A. D. 1921, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Monday, the 11th day of July, in the year of our Lord one thousand nine hundred twenty-one. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 16,287.

HARTLAND LAW

vs.

ARTHUR L. SMITH, etc.

**Minutes of Court—July 11, 1921—Order Denying  
Motion for New Trial.**

Plaintiff's motion for new trial came on to be heard and after arguments being submitted, it was ordered that said motion be and the same is hereby denied. [21]

(Title of Court and Causes.)

**Stipulation Extending Time to File Bill of Exceptions.**

It is hereby stipulated by and between the parties hereto that the plaintiffs may have twenty days from and after the date hereof in which to prepare serve and file their proposed bill of exceptions herein. This stipulation need not be filed.

Dated this 11th day of June, 1921.

FRANK M. SILVA,  
U. S. Attorney,  
E. M. LEONARD,  
Asst. U. S. Atty.,  
Attorneys for Defendant.

It is ordered:

FRANK H. RUDKIN,  
U. S. District Judge.

**Stipulation Extending Time to File Bill of Exceptions.**

It is hereby stipulated between the parties hereto that plaintiffs may have twenty days from and after this date in which to prepare and serve their bill of exceptions herein.

Dated this 30th day of June, 1921.

FRANK M. SILVA,  
U. S. Atty.,  
E. M. LEONARD,  
Asst. U. S. Atty.,  
Attorneys for Defendant.

It is so ordered.

FRANK H. RUDKIN,  
U. S. District Judge. [22]

---

(Title of Court and Causes.)

**Stipulation Extending Time to File Bill of  
Exceptions.**

It is hereby stipulated that plaintiffs herein may have twenty days from and after this date in which to prepare and serve their bill of exceptions herein.

Dated this 19th day of July, 1921.

FRANK M. SILVA,  
Attorneys for Defendant.

The foregoing stipulation is hereby extended to and including twenty days from and after the 8th day of August, 1921.

FRANK M. SILVA,  
Attorneys for Defendant.

The foregoing stipulation is hereby extended to and including twenty days from and after the 28th day of August, 1921.

FRANK M. SILVA,  
U. S. Atty.,  
E. M. LEONARD,  
Asst. U. S. Atty.,  
Attorneys for Defendant.

It is so ordered:

FRANK H. RUDKIN,  
U. S. District Judge.

In these consolidated cases the plaintiffs have prepared, served and filed herein their proposed



bill of exceptions to be used on an appeal, or writ of error, to which proposed bill of exceptions defendants have proposed certain amendments, the settlement of which is now pending and being considered by the Court and the respective attorneys and cannot be determined and settled before the expiration of the present term of this court.

NOW, THEREFORE, it is hereby stipulated and agreed by and between the respective parties hereto that the jurisdiction of [23] the above-entitled Court to act and settle the said bill of exceptions on behalf of plaintiffs may be and hereby is extended from the present term to and including the next ensuing term of said court, to wit, to and including the 4th day of March, 1922.

Dated October 26, 1921.

JOHN T. WILLIAMS,  
U. S. Attorney,  
E. M. LEONARD,  
Asst. U. S. Atty.,  
Attorneys for Defendants.  
F. W. SAWYER, and  
JOHN E. BENNETT,  
Attorneys for Plaintiffs.

It is so ordered:

FRANK H. RUDKIN,  
U. S. District Judge.

[Endorsed]: Filed Mar. 16, 1922. W. B. Mal-  
ing, Clerk. By J. A. Schaertzer, Deputy Clerk.  
[24]

(Title of Court and Causes.)

**Bill of Exceptions.**

BE IT REMEMBERED, that on the 1st day of June, 1921, the above-entitled causes came on for trial before the above-entitled court and a jury, the Court having ordered all of said cases consolidated for the purpose of trial.

Honorable William C. Van Fleet presiding, the plaintiffs appearing by John E. Bennett and F. W. Sawyer, and defendants appearing by Frank M. Silva, United States District Attorney, and E. M. Leonard, Assistant United States District Attorney, and Henry A. Cox, District Counsel United States Reclamation Service and the following proceedings were had:

It was admitted in evidence that Hartland Law, one of the plaintiffs herein, was at the time alleged in his complaint the owner and in possession of the property described in the complaint.

Also H. O. Comstock, of the firm of Lawrence & Comstock, one of the plaintiffs, a witness for plaintiff, Lawrence & Comstock, testified as follows:

Q. You have a place at Brockway, on Lake Tahoe?      A. Yes.

Q. Do you recall a rise in the lake surface in the latter part of June, June 24 to June 30, in 1916, the water rising upon your place?      A. Yes, sir.

Q. Just state to the jury what you have at Brockway, and at any other place, or any other region of the lake, around the lake, what land you

have, and how such land is improved, and what the condition was at the time the water rose.

The COURT.—You mean, of course, only the premises involved in the complaint, here?

Mr. BENNETT.—Yes, the lands described in the complaint. [25]

The COURT.—Your question should be to describe the premises set forth in his complaint; we are not concerned with any other.

Mr. BENNETT.—That is true, your Honor. They admit the ownership of the land described in the complaint.

The COURT.—Then what is the necessity of this?

Mr. BENNETT.—Merely to show what the condition was upon those several tracts of land that they had around the lake at this time.

The COURT.—Very well.

Mr. LEONARD.—If counsel will pardon me, I think we can get ahead faster by having Mr. Comstock locate on this chart where his property is.

The following questions among others were made to and answered by Hartland Law, one of the plaintiffs herein and a witness for plaintiff Law.

Mr. BENNETT.—State to his Honor and the Jury if there was a rise in the waters of the lake at your place in June, 1916, and what the condition of the place that you had was in consequence of that rise? I may say before that question is answered that it is stipulated that this (indicating) is the correct curve of the risings and fallings of the lake during the period that is stated, reaching from 1900 up until 1920; it is a hydrographic survey or curve

made by the engineers of the Government.

The COURT.—Of the annual rise and fall of the lake?

Mr. BENNETT.—Yes. This is the evidence. In 1916 the lake, by this curve, shows 6229.80, which is the figure we have in the complaint, the rise that caused us the injury. You will find that in 1915, in January, the line greatly falls, so that it is 6227. So that as between January and this month in here, which is June, there was a rise from 6227 up to 6229.8.

Mr. BENNETT.—(To Witness.) From June 24, 1916, Dr. Law, and after that time, was there on June 24th, 1916, and after that in [26] June a rise in the lake at your place? A. There was.

Q. What if any damage did that do, that rise in the lake at that time?

A. On account of the water being so high, whenever the boats passed, like the Tahoe steamer, the waves from the boat just washed up to the under side of the floor of the house and wet the floor; it also rose above the septic tank, and entirely filled the septic tank, and made it absolutely useless. And the ice house that we had in the boat house, or rather, in the basement of the boat house, was entirely destroyed. The gasoline tanks under the wharves were made useless. And, of course, the beach, and the walls on the beach, and the plants and shrubbery that we had arranged was destroyed.



H. O. COMSTOCK, of Lawrence & Comstock, one of the plaintiffs and a witness for Lawrence & Comstock testified in part as follows:

Mr. BENNETT.—Now, just explain to the jury how your property was improved, and what the surface of it was with respect to improvements at the time of the rise of the lake, and prior to the rise in question?

A. I will try and be very concise in this description, so as to give you just a little idea: Brockway is at the north end of the lake. The steamer coming around, we have a pier out there which has an L to it to protect the small boats in behind. East of the pier we built a stone wall, about 140 feet long, and we built it  $4\frac{1}{2}$  feet high and filled in behind with dirt, to have a lawn in front of the house. We also found there was hot water coming up in the lake, and we enclosed it by a cribbing of rocks, and then used small rock, and we boarded it on both sides and top and closed out the lake water, so that it came in very slowly, and the hot water came in and mixed with the cold water, and made a rise of temperature of about 18 degrees in the swimming pool. When this high water came in 1916, the lake became so high that the water was within about 13 or 14 inches of the top of the pier. We sent word over to the man in charge of the gate at Tahoe City that the water was so high that it was doing [27] damage. He replied that he was there under a salary and could not change the gate without further orders. There came a big storm, the wind com-



ing from the southwest, which gave it the full sweep of the lake, it gradually was eating the wall away, it would go in and get the soil behind and suck it out, and eventually it took the whole wall down.

Mr. LEONARD.—Your Honor, I desire to interpose an objection at this time. The witness is testifying to the effects of a storm. This calls to my mind that possibly on behalf of the Government I should have interposed a blanket objection to all testimony introduced with reference to damage prior to June 24, 1917. During your Honor's illness a demurrer was interposed and was passed upon by Judge Bean. Judge Bean said in effect, that in view of the condition of the authorities, and the uncertainty of the rule, the demurrer ought not be sustained, but the case should be disposed of at the trial; and that if the action is barred by the statute of limitations, inasmuch as the Government is really the defendant in the case, it will not be injured by proceeding to trial, whereas on the other hand, if the action is not barred, and the Court should rule that it was, the plaintiff would be compelled to appeal the case, causing delay and expense and therefore he felt that the demurrer should be overruled and the case tried on its merits. In view of that, if your Honor please, I take it that it is my duty to preserve the rights of the Government, and to interpose an objection to any evidence of damage prior to June 24, 1917.

The COURT.—1916, do you mean?

Mr. LEONARD.—No, your Honor, 1917. The

suit was filed in 1919. Of course everything must be excluded from 1916, which was a three-year period, and which would be a statutory period for direct trespass.

The COURT.—I think the backing up of water upon the premises [28] in the manner here shown, is not, in its nature, a direct trespass, it is a trespass which is the subject matter of an action for trespass on the case. A physical invasion by one upon the property of another, either by an individual, or with teams, or men, is, of course, a direct trespass; but where an act which causes the injury is not a direct cause of the invasion of the premises, but merely the indirect cause which produces an effect, which might not occur but for the intervention of other circumstances, then, it is not a direct trespass. I think the objection to anything, under the circumstances pleaded here—the objection to anything occurring prior to the period when the statute would bar an action of direct trespass is well taken.

The objection to the evidence here will be sustained; that is to say to any evidence as to injury as far back as 1916.

Mr. LEONARD.—Any evidence prior to June 24th, 1917, the two-year period?

The COURT.—Yes. I am satisfied the injury shown is a consequential injury.

Mr. BENNETT.—We take an exception to the ruling of the Court.

Mr. BENNETT.—We cannot proceed if we can-

not introduce any testimony to show what the damages were in 1916, by reason of your Honor's ruling, upon the ground that this is an action on the case and not an action in trespass.

The COURT.—Well, what do you propose to do—take a nonsuit?

Mr. BENNETT.—There is nothing else to do.

Mr. SAWYER.—(For the plaintiffs.) We have no further testimony. Our damages are all confined to the year 1916.

The COURT.—And the action was not commenced until June, 1919?

Mr. BENNETT.—No. We were dickering with the Government upon a compromise and were held up and prevented thereby because the Government was going to pay the damages. [29]

Mr. LEONARD.—That is outside of the record, your Honor.

The COURT.—It is merely stated by way of explanation as to why they did not commence their action earlier. I see here it is June 4th, 1919, I thought you said June 24. This says "Filed June 4."

Mr. LEONARD.—I am in error about that your Honor. I am speaking of the complaint in the Lawrence case.

The COURT.—Were they all filed on the same date?

Mr. BENNETT.—I think so, they were all filed in 1919.

Mr. LEONARD.—They were all filed in June,

1919. I understand counsel to say he has no further evidence?

Mr. SAWYER.—We have no further evidence on damages. We have no further case. Our case is based on damages in 1916. Under the ruling we are excluded from further testimony.

Mr. LEONARD.—I move for a nonsuit.

The COURT.—The nonsuit will be granted as to all four cases. Gentlemen of the jury, you will be excused from further consideration of the case.

Mr. SAWYER.—We take an exception to the order granting the nonsuit.

Counsel for plaintiffs hereby tender this their bill of exceptions and pray that it may be settled and allowed and signed and certified by the Judge as provided by law.

JOHN E. BENNETT,  
F. W. SAWYER,  
Attorneys for Plaintiffs.

### **Order Settling Bill of Exceptions.**

Upon application of plaintiffs and it appearing that the foregoing bill of exceptions has been agreed upon between counsel subject to stipulations following the same is hereby settled and allowed on this 27th day of February, 1922.

WM. C. VAN FLEET,  
Judge. [30]

It is hereby stipulated between counsel for the respective parties hereto that the within bill of exceptions may be signed by the Court and sealed as bill of exceptions in this case, but that the same



shall in no wise constitute a waiver or prejudice the right of plaintiff to make or file any motion or motions to strike from the files the said bill of exceptions upon the ground that the same was not served or filed within the time allowed by the rules of practice of this court or upon any other ground.

JOHN E. BENNETT,  
F. W. SAWYER,  
Attorneys for Plaintiffs.  
JOHN T. WILLIAMS,  
U. S. Attorney,  
E. M. LEONARD,  
Asst. U. S. Atty.,  
Attorneys for Defendant,  
A. L. SMITH.

[Endorsed]: Filed Feby. 27, 1922. Walter B. Maling, Clerk. [31]

---

(Title of Court and Causes.)

**Petition for Allowance of Writ of Error.**

Hartland Law, Eugene D. N. E. Lehe, Melville W. Lawrence and H. O. Comstock, copartners, doing business as Lawrence & Comstock, Nellie Copland and John Doe Copland, her husband, plaintiffs and petitioners, feeling themselves aggrieved by the rulings of the Court in the verdict and judgment therein entered on the 11th day of July, 1921, come now by Messrs. John E. Bennett and F. W. Sawyer, their attorneys, and petition said Court for an order allowing said plaintiffs to prosecute a writ of error



to the Honorable the United States Circuit Court of Appeals, for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which the plaintiffs shall give and furnish upon said writ of error, and that upon the giving of such security the said writ of error issue.

JOHN E. BENNETT and  
F. W. SAWYER,  
Attorneys for Plaintiffs.

[Endorsed]: Filed Jan. 10, 1922. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [32]

---

(Title of Court and Causes.)

### **Assignment of Errors.**

The foregoing cases having been by order of the above-entitled Court consolidated, and so consolidated trial was begun thereon in said court before a jury, and on June 1st, 1921, in the course of said trial a motion for nonsuit therein was made by defendant Smith, being the only defendant who had been served with summons, and the said motion was thereupon granted by the Court and exception thereto was taken by plaintiff; and thereafter the Court instructed the jury to render a verdict for defendant which the jury did and thereupon judgment was entered in favor of defendant and against plaintiff dismissing said actions as to all of said plaintiffs

and for costs against plaintiffs. And thereafter plaintiffs filed their motion for new trial therein and said motion for new trial coming on to be heard on the 11th day of July, 1921, the Court denied the same, and thereupon said judgment became final, to which order denying said motion plaintiffs duly excepted. And upon a writ of error upon such judgment returnable at the next term of this Court to be begun and holden in the City and County of San Francisco aforesaid on the — day of —, in the year 1922, plaintiffs and respondents at whose instance said writ of error is sued out, assign for error in the records of processes and judgment as aforesaid, the following, to wit:

That during said trial and during the examination by plaintiffs of a witness for plaintiffs, for the purpose of which testimony was to show damage done to plaintiffs' lands and certain structures thereon by the waters of Lake Tahoe, which had been raised by defendant upon the lands of plaintiffs through defendant shutting down the dam at the mouth of Lake Tahoe for the purpose of backing the said waters up upon the land of plaintiffs and others whereby the quantity of water in said Lake Tahoe might be increased for the benefit [33] of defendant in drawing the same off and delivering the same elsewhere—while said witness was thus under examination defendant objected to any testimony being given by plaintiffs and by said witness as to any damage which had been thus occasioned during the year 1916, the same being the year in which said damage is alleged by the complaints to have oc-

curred, on the ground that such damage, if any, were barred by the statute of limitations of the Code of Civil Procedure of the State of California, within which state said lands were located, the said statute being section 339 of said Code, action thereunder requiring to be brought within two years from the time such injury arises. The said statute does not provide for a trespass upon or injury to real property but provides that there must be brought within two years an action "upon a contract, obligation or liability not founded upon an instrument of writing." Whereas section 338 of said Code provides that there must be brought within *three* years an action "for trespass upon or injury to real property." Defendant contended before the Court that plaintiffs' action having not been brought within two years, but having been brought within three years, was not upon, and the act of defendant in raising the water upon plaintiffs' lands was not, a trespass upon or injury to real property, but was trespass on the case, the same being not trespass at all within the language of section 338. That by reason of defendant raising the said waters as aforesaid not being trespass, said action not having been brought within two years from the date of the alleged injury, no evidence thereupon should be admitted. The Court, Hon. Wm. C. Van Fleet, so held, sustained defendants' objection to said evidence or the question therefor, whereupon defendant moved a nonsuit, which the Court granted and to which plaintiffs excepted.

The foregoing rulings are assigned herein as error, plaintiffs asserting that the injuries alleged in the complaints and offered in [34] proof are trespass to real property and not trespass in the case, and that the actions thereupon were properly brought within three years from the date of their occurrence.

WHEREFORE, plaintiffs pray that the judgment against them as aforesaid, for the error aforesaid, and other errors in the record aforesaid, proceedings and matters herein set forth, may be referred and annulled and held for nothing and that they may be restored to all things lost by them by reason of said judgment.

JOHN E. BENNETT and  
F. W. SAWYER,  
Plaintiffs' Attorneys.

[Endorsed]: Filed Jan. 10, 1922. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [35]

---

(Title of Court and Causes.)

**Order Allowing Writ of Error.**

Upon motion of John E. Bennett and F. W. Sawyer, Esqs., attorneys for above-named defendants, and upon filing a petition for a writ of error and assignment of errors,

IT IS ORDERED that a writ of error be and it is hereby allowed to have review in the United States Circuit Court of Appeals for the Ninth Cir-



cuit, the judgment heretofore entered herein and that the amount of bond on said writ of error be fixed in the sum of Three Hundred and no/100 (\$300.00) Dollars, the same to be given by Hartland Law, and to stand for the said consolidated cases and plaintiffs and to serve as cost bond on said writ of error.

WM. W. MORROW,  
Judge.

[Endorsed]: Filed Jan. 10, 1922. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [36]

---

(Title of Court and Causes.)

**Bond on Writ of Error.**

KNOW ALL MEN BY THESE PRESENTS, that we, Hartland Law, as principal, and Globe Indemnity Company, as surety, are held and firmly bound unto Arthur L. Smith, Dam Gate-keeper, A. P. Davis, Chief Engineer and Director F. G. Hough, Late Project Superintendent, John F. Truesdell, Special Assistant to the Attorney General of the United States Reclamation Service, in the full and just sum of Three Hundred (300) Dollars, to be paid to them, their certain attorneys, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

SEALED with our seals and dated this 10th day of January, 1922.



WHEREAS, lately at a District Court of the United States for the Northern District of California, in a suit depending in said Court, between Hartland Law, consolidated cases, Eugene D. N. E. Lehe, Melville W. Lawrence and H. O. Comstock, copartners, etc., Nellie Copland and John Doe Copland, as separate plaintiffs, and the foregoing first named parties, as defendants, a judgment was rendered against the said Hartland Law and others as aforesaid, and the said Hartland Law, in said consolidated cases, having obtained from said Court a writ of error to reverse the said judgment, in the aforesaid suit, and a citation directed to the said defendants citing and admonishing them to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California,

NOW, the condition of the above obligation is such that if the said Hartland Law shall prosecute to effect and [37] answer all damages and costs, if he fails to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

HARTLAND LAW,  
GLOBE INDEMNITY COMPANY [Seal]

By JOHN H. ROBERTSON,  
Agent and Atty.-in-fact.

Form of bond and sufficiency of sureties approved.

WM. W. MORROW,  
Judge.

[Endorsed]: Filed Jan. 10, 1922. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [38]

(Title of Court and Cause.)

**Praeipce for Transcript on Writ of Error.**

To the Clerk of Said Court:

Sir:

Please make up transcript in error in the above-entitled case, to be composed of the following papers:

Plaintiffs' complaint as amended.

Answer of defendant Smith.

Assignment of errors.

Bill of exceptions.

Bond on writ of error.

Certificate of Clerk U. S. District Court to  
transcript on writ of error.

Citation on writ of error.

Stipulations extending time to prepare and  
file and settle bill of exceptions.

Minutes of court at trial, two days, June —, 1921.

Order denying motion for new trial.

Order allowing writ of error.

Motion for new trial—plaintiffs' notice of  
intention to move.

Orders extending time to prepare and file  
record of transcript on appeal.

Order settling bill of exceptions.

Petition for writ of error.

Praeipce for transcript of record.

JOHN E. BENNETT and

F. W. SAWYER,

Attorneys for Plaintiff.

[Endorsed]: Filed Mar. 16, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [39]

---

In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

Nos. 16,285, 16,287, 16,292, 16,293.

HARTLAND LAW,

Separate Plaintiff,

EUGENE D. N. E. LEHE,

Separate Plaintiff,

MELVILLE W. LAWRENCE, et al.,

Separate Plaintiffs,

NELLIE COPLAND et al.,

Separate Plaintiffs,

vs.

ARTHUR L. SMITH, Dam Gate-keeper, et al.,

Defendants.

**Certificate of Clerk U. S. District Court to Transcript of Record.**

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify the foregoing thirty-nine (39) pages, numbered from 1 to 39, inclusive, to be a full, true and correct copy of the record and proceedings in the above-entitled causes, as enumerated in the praecipe for record on writ of error, as the same remains of record and on file in the office of the Clerk of said Court, and that the

same constitute the return to the annexed writs of errors.

I further certify that the cost of the foregoing return to writs of errors is \$18.25; that said amount was paid by the plaintiffs, and that the original writs of errors and citations issued in said causes are hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 27th day of March, A. D. 1922.

[Seal]                      WALTER B. MALING,  
Clerk United States District Court for the Northern  
District of California. [40]

---

### **Writ of Error.**

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States for the Northern District of California, GREETING:

BECAUSE, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Melville W. Lawrence and H. O. Comstock, doing business as Lawrence & Comstock, Arthur L. Smith, Dam Gate-keeper, A. P. Davis, Chief Engineer and Director; F. G. Hough and John P. Truesdell Special Assistant to U. S. Attorney General Reclamation Service, Defendants in Error, a manifest error hath happened, to the great damage of the said Melville W. Lawrence and H.



O. Comstock, doing business as Lawrence & Comstock, plaintiffs in error, as by their complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, the 10th day of January, in the year of our Lord one thousand nine hundred and twenty-two.

[Seal]

WALTER B. MALING,  
Clerk of the United States District Court, Northern  
District of California.

By J. A. Schaertzer,  
Deputy Clerk.

Allowed by

WM. W. MORROW,  
Judge Circuit Court of Appeals. [41]



**(Return to Writ of Error.)**

The answer of the Judge of the District Court of the United States, in and for the Northern District of California, Second Division.

The record and all proceedings of the pliant whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded by the Court.

[Seal]                      WALTER B. MALING,  
Clerk U. S. District Court for the Northern District  
of California.

[Endorsed]: No. 16,285. United States District Court for the Northern District of California. Melville W. Lawrence and H. O. Comstock, etc., Plaintiffs in Error, vs. Arthur L. Smith, etc., et als., Defendant in Error. Writ of Error. Filed Jan. 11, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

Due receipt of copy of within admitted this 11th day of January, 1922.

JOHN T. WILLIAMS,  
U. S. Atty.,  
E. M. LEONARD,  
Asst. U. S. Atty.,  
Attorneys for Defendants.

**Citation on Writ of Error.**

UNITED STATES OF AMERICA,—ss.

'The President of the United States, to Arthur L. Smith, Dam Gate-keeper, A. P. Davis, Chief Engineer, F. G. Hough, Late Project Superintendent, John P. Truesdell, Reclamation Service, Special Assistant to the Attorney General of the United States, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the Clerk's Office of the United States District Court for the Northern District of California, wherein Melville W. Lawrence and H. O. Comstock, copartners doing business as Lawrence & Comstock, are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable W. W. MORROW, United States Circuit Court for the Ninth Circuit, United States Circuit Court of Appeals, this 10th day of January, A. D. 1922.

WM. W. MORROW,  
United States Circuit Judge. [42]

Due receipt of copy admitted this 11th day of January, 1922.

JOHN T. WILLIAMS,  
U. S. Atty.,  
E. M. LEONARD,  
Asst. U. S. Atty.,  
Attorneys for Defts.

[Endorsed]: No. 16,285. United States District Court for the Northern District of California. Melville W. Lawrence and H. O. Comstock, etc., Plaintiffs in Error, vs. Arthur P. Smith, et als., etc., Defendants in Error. Citation on Writ of Error. Filed Jan. 11, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

---

**Writ of Error.**

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States for the Northern District of California, GREETING:

BECAUSE, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Hartland Law and Arthur L. Smith, Dam Gate-keeper, A. P. Davis, Chief Engineer and Director, F. G. Hough, Late Project Superintendent, John P. Truesdell, Special Assistant to Attorney General U. S. Reclamation Service, Defendants in Error, a manifest error hath happened, to the

great damage of the said Hartland Law, plaintiff in error, as by his complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, the 10th day of January, in the year of our Lord one thousand nine hundred and twenty-two.

[Seal]                      WALTER B. MALING,  
Clerk of the United States District Court Northern  
District of California.

By J. A. Schaertzer,  
Deputy Clerk.

Allowed by:

WM. W. MORROW,  
Judge Circuit Court of Appeals. [43]



**(Return to Writ of Error.)**

The answer of the Judge of the District Court of the United States, in and for the Northern District of California, Second Division.

The record and all proceedings of the pliant whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal]

WALTER B. MALING,

Clerk U. S. District Court for the Northern District of California.

[Endorsed]: No. 16,287. United States District Court for the Northern District of California. Hartland Law, Plaintiff in Error, vs. Arthur L. Smith, et al., Defendants in Error. Writ of Error. Filed Jan. 11, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

Due receipt of copy of within admitted this 11th day of January, 1922.

JOHN T. WILLIAMS,

U. S. Atty.,

E. M. LEONARD,

Asst. U. S. Atty.,

Attorneys for Dfts.



**Citation on Writ of Error.**

UNITED STATES OF AMERICA,—ss.

The President of the United States, to Arthur L. Smith, Dam Gate-keeper, A. P. Davis, Chief Engineer and Director, F. G. Hough, Late Project Superintendent, John P. Truesdell, Reclamation Service, Special Assistant to the Attorney General of the United States, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the Clerk's Office of the United States District Court for the Northern District of California, wherein Hartland Law is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable W. W. MORROW, United States Circuit Judge for the Ninth Circuit of the United States Circuit Court of Appeals, this 10th day of January, A. D. 1922.

WM. W. MORROW,  
United States Circuit Judge. [44]

[Endorsed]: No. 16,287. United States District Court for the Northern District of California. Hartland Law, Plaintiff in Error, vs. Arthur L.

Smith, et als., Defendants in Error. Citation on Writ of Error. Filed Jan. 11, 1922. W. B. Mal-  
ling, Clerk. By J. A. Schaertzer, Deputy Clerk.

Due receipt of copy of within admitted this 11th  
day of January, 1922.

JOHN T. WILLIAMS,  
U. S. Atty.,  
E. M. LEONARD,  
Asst. U. S. Atty.,  
Attorneys for Defts.

---

**Writ of Error.**

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to  
the Honorable, the Judges of the Distirct  
Court of the United States for the Northern  
District of California, GREETING:

BECAUSE, in the record and proceedings, as  
also in the rendition of the judgment of a plea  
which is in the said District Court, before you, or  
some of you, between Eugene D. N. E. Lehe and  
Arthur L. Smith, Dam Gate-keeper, A. P. Davis,  
Chief Engineer and Director, F. G. Hough, Late  
Project Superintendent, John P. Truesdell, Rec-  
lamation Service Special Assistant to United States  
Attorney General, Defendants in Error, a manifest  
error hath happened, to the great damage of the  
said Eugene D. N. E. Lehe, plaintiff in error, as  
by his complaint appears:

We, being willing that error, if any hath been,

should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, the 10th day of January, in the year of our Lord one thousand nine hundred and twenty-two.

[Seal]                      WALTER B. MALING,  
Clerk of the United States District Court, Northern  
District of California.

By J. A. Schaertzer,  
Deputy Clerk.

Allowed by

WM. W. MORROW,  
Judge Circuit Court of Appeals. [45]

**(Return to Writ of Error.)**

The answer of the Judge of the District Court of the United States, in and for the Northern District of California, Second Division.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal]

WALTER B. MALING,

Clerk U. S. District Court for the Northern District of California.

[Endorsed]: No. 16,292. United States District Court for the Northern District of California. Eugene D. N. E. Lehe, Plaintiff in Error, vs. Arthur L. Smith et al., Defendants in Error. Writ of Error. Filed Jan. 11, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

Due receipt of copy of within admitted this 11th day of January, 1922.

JOHN T. WILLIAMS,

U. S. Atty.,

E. M. LEONARD,

Asst. U. S. Atty.,

Attorneys for Defendants.



**Citation on Writ of Error.**

UNITED STATES OF AMERICA,—ss.

The President of the United States, to Arthur L. Smith, Dam Gate-keeper, A. P. Davis, Chief Engineer, F. G. Hough, Late Project Superintendent, John P. Truesdell, Special Assistant to the Attorney General of the United States Reclamation Service, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the Clerk's Office of the United States District Court for the Northern District of California, wherein Eugene D. N. Lehe is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable W. W. MORROW, United States Circuit Judge for the Ninth Circuit of the United States Circuit Court of Appeals this 10th day of January, A. D. 1922.

WM. W. MORROW,  
United States Circuit Judge. [46]



[Endorsed]: No. 16,292. United States District Court for the Northern District of California. Eugene D. N. E. Lehe, Plaintiff in Error, vs. Arthur L. Smith et al., Defendants in Error. Citation on Writ of Error. Filed Jan. 11, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

Due receipt of copy of within admitted this 11th day of January, 1922.

JOHN T. WILLIAMS,  
U. S. Atty.

E. M. LEONARD,  
Asst. U. S. Atty.,  
Attorneys for Defendants.

---

### **Writ of Error.**

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States for the Northern District of California GREETING:

BECAUSE, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Nellie Copland and John D. Copland, Her Husband, Against Arthur L. Smith, Dam Gate-keeper, A. P. Davis, Chief Engineer, F. G. Hough, Late Project Superintendent, John P. Truesdell, Reclamation Service, Special Assistant to United States Attorney General, defendants in error, a manifest error hath happened, to the great damage of the said Nellie Copland and John Doe

Copland, her husband, plaintiffs in error, as by their complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, the 10th day of January, in the year of our Lord one thousand nine hundred and twenty-two.

[Seal]

WALTER B. MALING,  
Clerk of the United States District Court, Northern  
District of California.

By J. A. Schaertzer,  
Deputy Clerk.

Allowed by

WM. W. MORROW,  
Judge Circuit Court of Appeals. [47]

**(Return to Writ of Error.)**

The answer of the Judge of the District Court of the United States, in and for the Northern District of California, Second Division.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal]

WALTER B. MALING,  
Clerk U.S. District Court for the Northern District  
of California.

[Endorsed]: No. 16,293. United States District Court for the Northern District of California. Nellie Copland etc., et al., Plaintiffs in Error, vs. Arthur L. Smith, etc., Defendants in Error. Writ of Error. Filed Jan. 11, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

Due receipt of copy of within admitted this 11th day of January, 1922.

JOHN T. WILLIAMS,  
U. S. Atty.

E. M. LEONARD,  
Asst. U. S. Atty.,  
Attorneys for Defendants.

**Citation on Writ of Error.**

UNITED STATES OF AMERICA,—ss.

The President of the United States, to Arthur L. Smith, Dam Gate-keeper, A. P. Davis, Chief Engineer, F. G. Hough, Late Project Superintendent, John P. Truesdell, Special Assistant to the Attorney General of the United States Reclamation Service, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the Clerk's Office of the United States District Court for the Northern District of California, wherein Nellie Copland and John Doe Copland, Her Husband, are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable W. W. MORROW, United States Circuit Judge for the Ninth Circuit of the United States Circuit Court of Appeals, this 10th day of January, A. D. 1922.

WM. W. MORROW,  
United States Circuit Judge. [48]



[Endorsed]: No. 16,293. United States District Court for the Northern District of California. Nellie Copland and John Doe Copland, Her Husband, Plaintiffs in Error, vs. Arthur L. Smith et al., etc., Defendants in Error. Citation on Writ of Error. Filed Jan. 11, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

Due receipt of copy of within admitted this 11th day of January, 1922.

JOHN T. WILLIAMS,  
U. S. Atty.

E. M. LEONARD,  
Asst. U. S. Atty.,  
Attorneys for Defendants.

---

[Endorsed]: No. 3850. United States Circuit Court of Appeals for the Ninth Circuit. Hartland Law, Eugene D. N. E. Lehe, Melville W. Lawrence and H. O. Comstock, Copartners, Doing Business as Lawrence & Comstock, Nellie Copland and John Doe Copland, Her Husband, Plaintiffs in Error, vs. Arthur L. Smith, Dam Gate-keeper, A. P. Davis, Chief Engineer and Director, F. G. Hough, Late Project Superintendent, John F. Truesdell, Special Assistant to the Attorney General of the United States Reclamation Service, Defendants in Error. Transcript of Record. Upon Writs of Error to the Southern Division of the United States District



Court of the Northern District of California, Second Division.

Filed March 29, 1922.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.

---

In the United States Circuit Court of Appeals for  
the Ninth Circuit.

CONSOLIDATED CASES.

No. —.

HARTLAND LAW,

Plaintiff and Appellant,

vs.

ARTHUR L. SMITH et als.,

Defendant and Respondent.

EUGENE D. N. E. LEHE,

Plaintiff and Appellant,

vs.

SAME,

Defendants and Respondent.

MELVILLE W. LAWRENCE, etc.

Plaintiffs and Appellant,

vs.

SAME,

Defendants and Respondents.

NELLIE COPLAND, etc.,

Plaintiffs and Appellants,

SAME,

Defendants and Respondents.

**Order Extending Time to File Transcript of Record.**

Upon motion of John E. Bennett, Esq., and good cause therefor appearing, it is hereby ordered that appellants have thirty days from and after this date in which to prepare and transmit the record on appeal herein from the District Court of the United States to this Court and to file the same.

Dated this 9th day of February, 1922.

WM. W. MORROW,

Judge.

[Endorsed]: No. 3850. In the United States Circuit Court of Appeals for the Ninth Circuit. Hartland Law, Appellant, vs. Arthur L. Smith et als., Respondents. And Other Cases Consolidated. Order Extending Time to File Transcript. Filed Feb. 9, 1922. F. D. Monckton, Clerk. Refiled Mar. 29, 1922. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for  
the Ninth Circuit.

CONSOLIDATED CASES — Nos. 16,287, 16,292,  
16,285 and 16,293.

HARTLAND LAW,

Separate Plaintiff,

D. N. E. LEHE,

Separate Plaintiff,

MELVILLE W. L. LAWRENCE and H. O. COM-  
STOCK, Copartners, Doing Business as  
LAWRENCE & COMSTOCK,

Separate Plaintiffs,

NELLIE COPLAND and JOHN DOE COPLAND,  
Her Husband,

Separate Plaintiffs,

vs.

ARTHUR L. SMITH, Dam Gate-keeper, A. P.  
DAVIS, Chief Engineer and Director, F. G.  
HOUGH, Late Project Superintendent,  
JOHN F. TRUESDELL, Special Assistant  
to the Attorney General, of the United States  
Reclamation Service and Related to the  
Truckee Carson Project of said Service,  
Defendants.

**Order Extending Time to File Transcript of Rec-  
ord.**

**EXTENSION OF TIME TO PLAINTIFF IN  
ERROR TO PREPARE AND FILE RECORD  
ON APPEAL HEREIN.**

Upon motion of John E. Bennett, and good cause

therefor appearing, it is hereby ordered that plaintiffs in error have twenty days from and after the 11th day of March, 1922, in which to prepare and transmit the record on appeal herein from the District Court of the United States to this Court and to file the same.

Dated this 10th day of March, 1922.

W. H. HUNT,  
Judge.

[Endorsed]: No. 3850. In the United States Circuit Court of Appeals Ninth Circuit. Hartland Law, Separate Plaintiff et als., vs. Arthur L. Smith, etc., et als., Defendants. Consolidated Cases. Order Extending Time to File Transcript on Appeal. Filed Mar. 10, 1922. F. D. Monckton, Clerk. Re-filed Mar. 29, 1922. F. D. Monckton, Clerk.

---

In the United States Circuit Court of Appeals,  
Ninth Circuit.

CONSOLIDATED CASES—Numbered in United States District Court, Southern Division, for the Northern District of California, Nos. 16,287, 16,292, 16,285, 16,293.

HARTLAND LAW,

Separate Plaintiff,

EUGENE D. N. E. LEHE,

Separate Plaintiff,

MELVILLE W. LAWRENCE and H. O. COMSTOCK, Copartners Doing Business as  
LAWRENCE & COMSTOCK,

Separate Plaintiffs,

NELLIE COPLAND and JOHN DOE COPLAND,  
Her Husband,

Separate Plaintiff,

vs.

ARTHUR L. SMITH, Dam Gate-keeper, A. P.  
DAVIS, Chief Engineer and Director, F. G.  
HOUGH, Late Project Superintendent,  
JOHN F. TRUESDELL, Special Assistant  
to the Attorney General of the United States  
Reclamation Service and Related to the  
Truckee Carson Project of said Service,  
Defendants.

**Affidavit and Order Re Transmission of Records on  
Appeal.**

John E. Bennett, being first duly sworn, deposes and says: He is one of the counsel of record in the above-entitled causes: That the said cases were consolidated by order of the United States District Court aforesaid in said court for trial therein, and judgment was had upon nonsuit of plaintiffs against plaintiffs and for defendant, and the same was entered against each and all of the plaintiffs. That the said causes are now on appeal from said District Court to the said Circuit Court of Appeals, and the transcript of the record has been made up in said District Court and transmitted to the said Circuit Court of Appeals in the case of Hartland Law. That the said Law and each of the other plaintiffs are willing and desire that the decision of the said Circuit Court of Appeals which may be made by said Court in the appeal of the said Hartland Law shall be



entered in each of the other of said cases without making up and transmitting the record in each of said cases, or in any other of said cases except the said case of Hartland Law, and that for this purpose the said cases shall be deemed consolidated for hearing in the said United States Circuit Court of Appeals in the same manner in which they stood consolidated in the said District Court. That the question to be settled by the appeal in the said case of Hartland Law is the same question and none other that exists in and relates to each of said other cases.

And further affiant saith not.

JOHN E. BENNETT.

Subscribed and sworn to before me this 29th day of March, 1922.

[Seal]

THEO. FROLICH,

Notary Public in and for the City and County of  
San Francisco, State of California.

### ORDER.

Upon the foregoing affidavit of John E. Bennett, and upon motion of said John E. Bennett, of counsel for appellant herein, and good cause appearing therefor, it is hereby ordered that transcripts of the records on appeal in each and all of the said cases, except that of Hartland Law, be not made up and transmitted from the said District Court to the said Circuit Court of Appeals, but that the decision of the said United States Circuit Court of Appeals, Ninth Circuit which may hereafter be rendered in said case of Hartland Law, and all rulings and or-

ders of the said Circuit Court of Appeals therein, shall be entered in each of said cases with as full effect as if said transcripts had been made up and transmitted as aforesaid.

WM. W. MORROW,  
Judge.

[Endorsed]: No. 3850. In the United States Circuit Court of Appeals, Ninth Circuit. Hartland Law, et als., Separate Plaintiffs, vs. Arthur L. Smith etc., et al. Affidavit and Order Re Transmission of Records on Appeal. Filed Mar. 29, 1922. F. D. Monckton, Clerk.

No. 3850

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

HARTLAND LAW, EUGENE D. N. E. LEHE, MELVILLE W. LAWRENCE and H. O. COMSTOCK, copartners, doing business as LAWRENCE & COMSTOCK, NELLIE COPLAND and JOHN DOE COPLAND (her husband),

*Plaintiffs in Error;*

vs.

ARTHUR L. SMITH, dam gate-keeper, A. P. DAVIS, chief engineer and director, F. G. HOUGH, late project superintendent, JOHN F. TRUESDELL, special assistant to the attorney general of the United States reclamation service,

*Defendants in Error.*

## BRIEF FOR PLAINTIFFS IN ERROR.

JOHN E. BENNETT,

OLIVER DIBBLE,

*Attorneys for Plaintiffs in Error.*

FILED

APR 29 1922

F. D. MONGKTON,



No. 3850

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

---

HARTLAND LAW, EUGENE D. N. E. LEHE, MELVILLE W. LAWRENCE and H. O. COMSTOCK, copartners, doing business as LAWRENCE & COMSTOCK, NELLIE COPLAND and JOHN DOE COPLAND (her husband),

*Plaintiffs in Error,*

VS.

ARTHUR L. SMITH, dam gate-keeper, A. P. DAVIS, chief engineer and director, F. G. HOUGH, late project superintendent, JOHN F. TRUESDELL, special assistant to the attorney general of the United States reclamation service,

*Defendants in Error.*

---

## BRIEF FOR PLAINTIFFS IN ERROR.

---

### Statement of the Case.

The defendant in this case is Arthur L. Smith, keeper of the dam at Lake Tahoe, in the employ of the United States, and handling the dam as a part of the Truckee-Carson Reclamation Project,



now called the Newlands Project, whereby water is impounded in Lake Tahoe, a public navigable body of water, some twenty-six miles long by thirteen broad, for conducting through canals and the irrigation of lands in the State of Nevada. The plaintiff is one of four plaintiffs, whose cases were consolidated for trial, who owns land riparian to the lake. The dam in question is located at the outlet of the lake, where the water passing from the lake forms the Truckee River. The dam is provided with movable gates, and these have for some years been operated by defendant and his employer, the United States Reclamation Service, for the purpose of raising water in the lake and so impounding it for the uses of the irrigation canals, releasing the water at such time as may meet the requirements of that system.

The complaint alleges that on the 30th of June, 1916, the defendants were so operating this dam at the mouth of the lake; that they then and there shut down the gates of the dam and raised the waters of the lake upon the lands of plaintiff where they did certain damage alleged to be of the amount of five thousand dollars.

The case was not tried on its merits but went off on a nonsuit upon motion of defendant on the ground that the action disclosed was not trespass, but trespass on the case, and that as such it was barred in two years after the alleged occurrence, whereas the suit was not filed until after two years from the date of the happening. That is to say:

that the action fell under section 339 of the Code of Civil Procedure of California, and not under section 338, subdivision 2, thereof. Section 339 has limitation of two years and section 338, subdivision 2 has three years. If the action should be found by this Court to fall under section 338, subdivision 2, then it was filed in time, and the judgment would be reversed and the cases remanded for the trial to proceed with. If however the Court should find that the action came under section 339, then the ruling of the Court below would be correct and the judgment would be affirmed.

---

### **Specification of Errors Relied Upon.**

The limitations of the respective sections:

Section 339 provides:

“Within two years: An action upon a contract, obligation or liability not founded upon an instrument of writing:”

Section 338, subdivision 2 provides:

“Within three years: An action for trespass upon real property.”

The question is was this act of raising the waters of the lake upon the land of plaintiff trespass upon real property, or was it something else? Counsel for defendant claims it was not trespass but was trespass on the case, a distinction which, of course,

does not go to the merits of the action but to the form under which the action is brought.

The dam, as stated, was at the mouth of the lake, and through its manipulation by defendant the waters of the lake were made to rise. In shutting down the gates it was the direct purpose and intention of defendant to raise the waters upon the lands of plaintiff, and upon the lands of all other parties around the lake. The purpose was, in other words, to add the shore lands to the lake bottom and use them for impounding water upon to the end that the Reclamation District might have more water to draw off for its system. This fact is very important: as to what the object, intention and design of defendant was in shutting down the gates of the dam. The dam is a mere structure across a public body of water the surrounding lands of which are owned by private parties. Defendant was not raising waters on his own lands which having filled his own lands overflowed from thence upon lands of another, his object in shutting down the gates being not to overflow the others' lands but to overflow his own lands—such was not the case. His purpose was to lift the waters upon the lands of other people, to hold them there as long as he liked,—he held them there throughout the season—then draw them off when it was to his interest to do so. It would be difficult to see how there could arise a plainer, flatter case of a direct, intentional, purposeful and successful invasion of private property through any instrument which it

might please the invader to employ for this purpose, than by this defendant using the dam to pour the waters of the lake upon these lands and to hold such waters there in place until he got ready to let them go.

The ruling of the Court below—not on the demurrer, for Judge Bean overruled the demurrer, but on the nonsuit by Judge Van Fleet, by which the ruling of Judge Bean was disregarded—here the ruling was that when Smith shut down the dam gates he did the act which he intended; such was his direct act; the lifting of the waters of the lake upon plaintiff's lands was not a direct act but was *a consequence* of his shutting down the gates, hence the impounding of the waters upon plaintiff's lands was a consequential or resulting incident and the action was therefore not trespass but trespass on the case. If this reasoning be correct then we submit, trespass could never occur. For always it would be said, whatever instrument the invader might employ, whether such be a pistol to a fire a shot or a horse to drive over and upon one's land, that the intruder did not intend to enter the land which was the definite object of his endeavor, but that he merely intended to actuate the instrument through which invasion of the land was effected.

The act of defendant was a *taking of the land* out of the possession of plaintiffs into possession of defendant. Defendant himself admits this. He claims to have done what he did as a matter of



right. In other words, he claims by his answer an *easement* in the land, and claims to have acquired it by prescription. The action which plaintiff might have brought was ejectment, and the allegation would be ouster. From defendant's standpoint he was entering the property as his own property; from plaintiff's standpoint he was invading the property. Can there be any doubt that the act of defendant, unless he had an easement to do what he did, was trespass?

1 Chitty on Pleadings, 196.

The case at bar is similar in fact and in law to *Conniff v. San Francisco*, 67 Calif. 49, which has never been overruled, and which is now the law in California. That case like this was the flooding of land by the damming of a public water course, the run being a natural creek on Montgomery Street and the land being a lot of an adjacent owner. In repairing the street the city dammed this stream the result being that the water was backed up over the lot. The question there, as here, was whether the case was case or trespass with a view to determining whether the action should have been brought in three or two years. It was held to be trespass. The Court says:

“We know of no principle of law which justifies either a corporation or individual in stopping up by an embankment or dam a natural channel by which surface waters escape, obstruct the natural flow of such waters and cause them to run over and permanently remain on another's property. Such conduct would be a most flagrant trespass on the rights



of another in the shape of a direct invasion of his land amounting to a taking of it within the rule laid down in *Pumpelly v. Green Bay Co.*, 13 Wall. 166.

“The case before us is not one of mere consequential damages which the landowner must protect himself against, and for which the law affords him no redress. It is a direct trespass upon the property of the plaintiff by the construction of a dam which a moment’s reflection would have made clear to anyone, must have inevitably in the course of nature have resulted in the permanent overflowing of the land of plaintiff when the rainy season came. \* \* \* The plaintiff had three years in which to bring this action. *The action complained of was a trespass on real property, and the action for damages caused by it was not barred for three years from its accrual.*” (Italics ours.)

The case of *Pumpelly v. Green Bay Co.*, supra, which the Court refers to, declared that the damming of a navigable stream which raised water upon adjacent land was a taking of such land, and rejected the contention of defendant, made there as here, that the damage was consequential. The Court say:

“It remains true that where real estate is actually invaded by superinduced additions of water, earth, sand or other material, or by having any artificial structure placed upon it, so as to effectually destroy or impair its usefulness, *it is a taking*, (italics ours) within the meaning of the constitution, and that this position is not in conflict with the weight of judicial authority in this country and certainly not with sound principle.”

Counsel replies as to this case that it is laid in trespass on the case and not in trespass. But a taking of land is not trespass on the case; it is trespass. No attention was paid by the Court to the form of the action, and the point was not raised. One may waive trespass and bring case, but however this may be, the Court was not talking case but trespass.

Kelley v. Lett, 35 N. C. 50;

3 Blackstone Comm., 123;

Gale v. Miles, 3 Conn. 70;

6 Cyc., 684.

In view of the Conniff case there would be no difficulty about the case at bar, and no question at all that the period of limitations was three years, were it not for the fact that the Supreme Court of California has a line of cases in which the plain rule laid down in Conniff v. San Francisco, following as it does the rule of Pumpelly v. Green Bay, is to some minds confused, but when carefully examined show themselves to leave the rule of Conniff v. San Francisco untouched. These cases are Hicks v. Drew, 117 Cal. 305; Daneri v. So. Cal. Ry. Co., 122 Cal. 507; Crim v. San Francisco, 152 Cal. 279, and the rule applied in the Superior Court, though deemed not applicable to the facts by both the Appellate Court and the Supreme Court, in Porter v. Los Angeles, 29 Cal. App. Dec. 148, and 182 Cal. 515. These cases, starting with Hicks v. Drew, undertake to assert what was case and what was trespass at common law. They then conclude

that where a man is using his own land and the result of such use is to injure the land of another, that the action of such other against the first would be case; that is, the act would not be a direct invasion of the other's land but would be an indirect and consequential invasion of such land, in that what the first—call him A—was doing was the thing he had a right to do, to wit, use his own land; but that in using his own land he injured the land of another, such injury would be a consequence, hence not a direct thing—which would be trespass—therefore it would be case.

So we find in each of these cases the defendants were doing something to protect their own lands. In *Hicks v. Drew* he had erected a bulkhead on his land which diverted the storm waters flowing in the street from his land and directed them upon the land of the plaintiff. The Court held that these waters thus made to flow upon the lands of plaintiff was not trespass on part of defendant, but was case; that is, the flowing of such waters was a consequence of defendant's act in protecting his land; the object of defendant in setting up the bulkhead was not to put water on plaintiff's land, but was to keep the water from coming on to his own land, and this, the Court held, defendant had a right to do.

The reasoning is bad and the law is erroneous if we shall look to what case was and what trespass was at common law. For at common law the action in *Hicks v. Drew* would have been trespass

and not case. Case at common law was not what the California Court here thought it was. It was not an injury to another consequent upon one using his own; for if one so used his own as to do injury to another that injury was a direct and not an indirect act. Case was differentiated from trespass in that case lie for injuries committed without force, or for forcible injuries which damaged the plaintiff consequently only. The essence of trespass was force and injury resulting from force (1 Bouv. Law Dict., p. 288). Thus, if defendant raised water on plaintiff's land, that was trespass, for it was a thing done with force—it was a forcible entry of the land. But if the injury caused thereby to plaintiff was not injury done to the land, but because of the raising of water on the land plaintiff lost a sale of the property, and the action was to recover for this loss, such action would be not trespass but case. This is a very different principle from that in which a person finds it to his interest to injure the property of another in order to protect his own, which under all circumstances is trespass under the principle of the common law, a principle which was confused by the erroneous reasoning of the celebrated Lighted Squib Case in Smith's Leading Cases. In a case tried in England about thirty years ago three defendants were charged with murder. A ship had been wrecked, leaving four survivors afloat at sea in a boat, one of whom was a boy. The four were starving and



the three decided to kill the boy and eat his body that all might not perish. They did this and the three thereby survived. The question rose in the English Court, was this murder, or was it something else? It was held to be murder. And the reason it was such was that the three had no right to kill another in order to preserve their own lives. That the boy had as much right to his life as they had to theirs, and they could not protect their lives by destroying his. If the action there had been civil instead of criminal could there have been any doubt that the act of the three upon the boy was trespass and not case? It was the theory of the defense at that trial that in killing the boy they were merely protecting their own lives and this they had a right to do, that the destruction of the boy therefor was merely a consequence of their doing the thing which they had a right to do, hence the act was not murder but manslaughter. This is precisely the position that was upheld in *Hicks v. Drew* with respect of property, and is followed in the other cases cited. That by protecting one's own property, which one has a right to do, one thereby injures the property of another, that such injury is a consequence, which makes it case—or in criminal law, manslaughter, and not trespass, or in criminal law, murder.

Nevertheless whether the reasoning in *Hicks v. Drew* be wrong or right it has no application to this case at bar. For here the object of defendant was not to use his own property, but to use plain-



tiff's property. The dam was merely the instrument which he employed in getting the water of the lake up upon the plaintiff's land, which was where he wanted it, in order that it might be there held for his further purposes. The case is altogether different from where one owns the bed and banks of a stream and puts in a dam with the object of raising the water upon his own lands and not upon the lands of another, but an unprecedented flood comes and the water is raised upon the lands of another lying higher up, this in some cases has been held to be an injury to such other in case and not in trespass, in that it was not the object or intention of the owner of the dam to raise water upon other's land but upon his own land, and the overflow upon the other's land was the result of an unintentional act of the dam owner, a consequence of rightfully using his own land. This is the kind of case cited by the Court in *Hicks v. Drew* as being taken from *Gould on Waters*, section 210. But all such has no bearing here, since here the deliberate purpose of the defendant was not to raise water upon any land that he had, but to raise water on the land of plaintiff. Whether he had a right to do that by easement, as he states in his answer is altogether another question, which was not reached at the trial, and which plaintiff is prepared to meet when he comes to it.

Although it is repeatedly asserted by counsel for defendant that *Hicks v. Drew* overrules *Conniff v. San Francisco*, and Judge Bean seems to find the

two cases to be “not in entire harmony”, yet in *Hicks v. Drew* the Court distinctly says that “the facts in the case at bar do not bring it within the doctrine of *Conniff v. San Francisco*” (p. 311). And they do not. The City of San Francisco was not engaged in using land of its own when it turned the water onto *Conniff’s* land, as *Drew* was, and which comprises the essence of all those cases—*Daneri v. So. Cal. Ry. Co.*, and *Crim v. San Francisco*—so that the flooding of plaintiff’s land was a consequence of the using by defendants of their lands, or for protection of their lands. Here there was a lifting of the waters of the lake and impounding them upon the land of plaintiff for the purpose of storage of such waters upon such lands; of adding the lands of plaintiff, as we have remarked, to the bottom of the lake, for the purpose of increasing the reservoir capacity of the lake in order that defendants might store more water than they had theretofore done, a thing which, as we state the defense of defendant is that he had an easement to do, a permanent property in doing so. He alleges in his answer that he was operating said dam in “controlling the water levels of said lake”. And he avers (tr. p. 7) that he did not

“Shut down said gates and thereby caused the surface of the lake to rise to the height of 6229.8 feet above sea level, and alleges the fact to be that on or about the 30th day of June, 1916, the surface waters of said lake attained the level of 6229.8 feet above sea level, and that the gates of said dam were so operated and used under the power and authority, conditions and limita-

tions aforesaid, as to result, in combination with natural causes, in the attainment of said level."

The answer then says (p. 10) that defendant has a full right to do what he did:

"and at all times mentioned in said complaint have and have had a full right and power to raise the level of Lake Tahoe to more than the elevation of 6229.8 feet above sea level as against plaintiff, not only because of the authority and set out in such constitution and laws, and particularly those relating to arid lands as aforesaid, but also because of the fact that the United States, through itself and its predecessors in interest, has acquired and now owns the right, privilege and easement to regulate said lake, and to raise the level thereof to said elevation, 6229.8 feet above sea level, and, indeed, to a higher level, by prescription as against plaintiff and his lands described in the complaint, and to overflow said lands by that means, in that it and they have so regulated said lake continuously and raised the level of said lake to said elevation and more, in and upon the lands described in the complaint and against and adversely to the owners thereof and all those having an interest therein, including the plaintiff and his predecessors in interest, and have in that way and by that means overflowed said lands continuously and whenever required in connection with its and their storage operations and regulation of said lake for a period of more than five years prior to the commencement of this action, and for a period of more than five years prior to the date set forth in the complaint herein of the alleged injury to plaintiff's lands."

Herein there is a statement of that continuous flooding which constitutes a taking under the cases cited. Defendant, according to his statement, is now

doing it, he did it at the time stated in the complaint, he has always done it and he intends to continue to do it. Clearly here is a taking of the land. To hold that such act is trespass on the case and not trespass is to abolish the law of trespass.

The case of *Porter v. Los Angeles*, supra, has been brought forward by counsel for defendant as decisive of this case, yet in what manner it has any bearing is difficult to see. In that case the city put a tunnel under the street and the excavation caused a sinking of plaintiff's lot into the tunnel. The Superior Court held that the two year limitations applied because the land slide was a consequence of the city using its land; that therefore the action was case and not trespass. The Appellate and Supreme Courts held that the city had only an easement in the land; that easement was to use the surface of the land for a street. It was not to excavate under surface of the land to make a tunnel. That doing such was an added burden upon the easement. Hence the city in digging the tunnel was not doing what it had properly a right to do, and the slide was not in consequence of the doing of that rightful act, but it was something else than a rightful act, and by thereby drawing off the land from the side of the tunnel it was trespassing upon the property of plaintiff, and the action was trespass, hence the three limit prevailed.

*Porter v. Los Angeles* is notable and valuable to us here for the concurring opinion of Justice Olney in the case in the Supreme Court, 182 Calif. 515.



This is important for the guidance of this Court, for if a rule of the Supreme Court of the State does not commend itself to the United States Court that Court is not obliged to follow it. Justice Olney says:

“I concur in the result and the main opinion with the single exception of its acceptance of the rule of *Hicks v. Drew*, 117 C. 305, as the settled law of this State. The rule to which I strongly except is that subdivision 2 of section 338 of the Code of Civil Procedure, when it provides a period of three years for ‘an action of trespass upon real property’ refers only to what were strictly actions for trespass at the common law and excludes actions for invasions of rights in real property for which at common law the remedy was not trespass but trespass on the case. The construction so put upon the section has the remarkable result that although one of the primary purposes of our reformed procedure was to do away with the refined and frequently illusory distinctions of the common law between forms of action, and although the fundamental theory of our law is that it is one of substantive rights for whose breach there is in all cases but one form of action, while the common law was essentially a law of remedies and forms of action were all important, yet the distinctions of the common law between forms of action are imported into our law and still maintained. This is done, furthermore, not in connection with the form of the particular action, but in a purely incidental connection, that of the period of limitation. No reason whatever can be assigned why such distinctions should be preserved. They are an anachronism in our law, alien to its fundamental theory. They make the rights of the parties to turn, as in this case, not upon the merits, but upon refined and subtle distinctions, whose perpetuation makes the rights of the parties in many cases, as here, difficult of ascertainment without any necessity for



such difficulty. I believe that upon this point *Hicks v. Drew* should be overruled and the code section construed to mean that by trespass is meant any wrong to or invasion of rights in real property. Such is the usual meaning of the word 'trespass,' and such the meaning which has been given to it when used in similar statutes elsewhere (*Cohn v. Bonnett*, 62 Tex. 674; *Bear v. Marx*, 63 Tex. 298; *Kelley v. Moore*, 51 Ala. 364). A reading, also, of this particular provision in connection with the other code provisions concerning the period of limitations indicates that this was the sense in which the word was used. I would not take the view that *Hicks v. Drew* should be overruled if its overruling would have the effect of cutting off any existing right of action. But the only effect of overruling it would be to extend, not to limit, the time within which certain actions may be brought. This being the case, I think it should be overruled in the interest of the administration of justice by as plain and simple rules as possible."

Manifestly the rule based upon case or trespass which the Supreme Court has set up in the *Hicks v. Drew* and other cases is a mere fiction. Its quality is to confuse the practitioner, and of course it would confound a plaintiff unlearned in the law who tried to handle his own case. Section 339 says nothing about trespass on the case upon real property. The section that treats of trespass to real property is section 338 s. d. 2. Anyone reading it would suppose that it means any kind of invasion of real property, and the fact that such invasion may have occurred as a result of defendant using his own property would not likely be looked at. As Justice Olney says, the usual meaning of the word trespass is any

invasion of real property, and he cites authorities in support of this. Surely this was the idea of the legislature of California in enacting the law, for by an amendment of 1921, probably growing out of these very cases, subdivision 2 of section 338 was amended to read: "An action for trespass upon *or injury to* real property." This clears up the obscurity and leaves the law providing the three-year period for an action upon an injury to real property, getting rid of the over-refined distinction about the word trespass.

We submit that the judgment should be reversed and the case remanded for trial.

Dated, San Francisco,

April 29, 1922.

JOHN E. BENNETT,

OLIVER DIBBLE,

*Attorneys for Plaintiffs in Error.*

# United States Circuit Court of Appeals

For the Ninth Circuit

---

HARTLAND LAW, EUGENE D. N. E.  
LEHE, MELVILLE W. LAWRENCE  
and H. O. COMSTOCK, copartners, do-  
ing business as LAWRENCE & COM-  
STOCK, NELLIE COPLAND and JOHN  
DOE COPLAND (her husband),

*Plaintiffs in Error,*

VS.

ARTHUR L. SMITH, dam gate-keeper, A. P.  
DAVIS, chief engineer and director, F. G.  
HOUGH, late project superintendent,  
JOHN F. TRUESDELL, special assistant  
to the attorney general of the United States  
Reclamation Service,

*Defendants in Error.*

## BRIEF FOR DEFENDANT IN ERROR ARTHUR L. SMITH

---

JOHN T. WILLIAMS,

*United States Attorney,*

E. M. LEONARD,

*Assistant United States Attorney,*

HENRY A. COX,

*District Counsel, U. S. Reclama-  
tion Service,*

*Attorneys for Defendant in Error,  
Arthur L. Smith.*



No. 3850

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

---

HARTLAND LAW, EUGENE D. N. E.  
LEHE, MELVILLE W. LAWRENCE  
and H. O. COMSTOCK, copartners, do-  
ing business as LAWRENCE & COM-  
STOCK, NELLIE COPLAND and JOHN  
DOE COPLAND (her husband),

*Plaintiffs in Error,*

vs.

ARTHUR L. SMITH, dam gate-keeper, A. P.  
DAVIS, chief engineer and director, F. G.  
HOUGH, late project superintendent,  
JOHN F. TRUESDELL, special assistant  
to the attorney general of the United States  
Reclamation Service,

*Defendants in Error.*

---

## BRIEF FOR DEFENDANT IN ERROR ARTHUR L. SMITH

---

### STATEMENT OF THE CASE.

The facts in the case are that the defendant in error, Arthur L. Smith, acting in the employ of the United States Reclamation Service, so operated the gates of the Government's dam below the outlet of Lake Tahoe at the northern end of the lake that in the latter part of June, 1916, the waters stored



therein attained an elevation of 6229.8 feet above sea level. The lands of plaintiff in error Law lie on Emerald Bay, near the south end of the lake and several miles distant from the dam. At or about the time the waters reached this point the evidence shows that the witness Comstock sent word to "the man in charge of the gate at Tahoe City that the water was so high that it was doing damage. He replied that he was there under a salary and could not change the gates without further orders". (Transcript, page 31). Afterwards a storm arose, which washed out a wall at Comstock's place and did damage to other structures at or near the waters' edge, such as the cribbing around a hot spring located in the lake at Comstock's place. (Transcript, pages 31, 32). Plaintiff in error Law testified (Transcript, page 30) to injuries caused by wave action when the Tahoe steamer and other boats passed his place, as well as injuries to his boat house, wharves, and beach.

Do these facts constitute trespass upon real property or trespass on the case? That is the only question involved. If they constitute trespass upon real property the suit was not barred by the two year statute of limitations and the ruling of the trial court was erroneous. If they constitute trespass on the case the suit was barred and the court's ruling was correct.

The injuries were alleged to have occurred in June, 1916. The suit was commenced in June, 1919,

more than two years, but apparently less than three years thereafter. Defendant in error plead the statute of limitations in his answer (Transcript, page 9) and at the trial made objections to the introduction of evidence as to damages occurring more than two years prior to the commencement of the action. The trial court held that "the backing up of water upon the premises in the manner here shown is not in its nature a direct trespass, it is a trespass which is the subject matter of an action of trespass on the case. \* \* \* The objection to the evidence here will be sustained." (Transcript, page 33.) Plaintiff in error then announced that, if such evidence was excluded he could not proceed with his case, but must submit to a nonsuit. (Transcript, page 34.) Upon motion of defendant in error a judgment of nonsuit was thereupon entered.

### ARGUMENT.

Under these facts defendant in error submits that there was no error in the ruling of the District Court for the following reasons:

First: Because the District Court followed the California Supreme Court, which has in several instances interpreted the expression "an action for trespass upon real property" in the California Statute of Limitations as not including cases of this character.

Second: Because the great weight of authorities supports the California decisions.

Third: Because the Federal Courts in this State should follow the California Supreme Court's interpretation of the California Statute of Limitations.

*California Authorities:*

Under the California decisions the alleged injuries to the lands of plaintiff in error were not the immediate act of the defendant in error, but only the consequence thereof. This question has been passed upon several times by the Supreme Court of California, and so far as we have been able to ascertain all of its decisions on the subject, with one possible exception, are uniformly to the effect that trespass on the case is the proper remedy in such cases, and that such actions are barred after two years by the statute of limitations. (Subdivision 1, Section 339, of the Code of Civil Procedure.) The possible exception referred to is the case of *Conniff v. San Francisco*, 67 Cal. 45, so strongly relied upon by the plaintiff in error. Later California decisions, beginning with the case of *Hicks v. Drew*, 117 Cal. 305, which will hereafter be more fully considered, have both distinguished the *Conniff* case from the case at bar and have expressly limited the rule laid down in the *Conniff* case to the precise facts involved in that case, namely: *the permanent flooding of lands in such a manner as to constitute an actual taking thereof*. (Page 311 of the *Hicks v. Drew* case, as will be hereinafter noted in an excerpt from that case.)

*Conniff v. San Francisco*: Plaintiff in error in his brief appears to rely almost entirely upon the Conniff case and by seeking to distinguish that case on the facts from Hicks v. Drew and other later decisions of the California Supreme Court, he insists that these later cases "leave the rule of Conniff v. San Francisco untouched". He takes the position on page 9 of his brief that there is a legal distinction between a case in which a man does some act for the protection of his land and where he does some other lawful act on his own land which results in injury to another's land, in that the former is trespass on the case, while the latter is a direct trespass upon real property. He cites no authority for such a distinction and we have found none. We do not believe that any such distinction can properly be drawn, especially in the light of the authorities hereinafter mentioned, several of which are at least strongly inferential to the contrary, and one (*Crockett v. Millett*, 65 Me. 191), while not a California case, is on the facts almost identical with the case at bar and holds trespass on the case to be the proper remedy.

The Conniff case appears to have been the first of a number of California cases involving the interpretation of the same clause in the Statute of Limitations relied upon in this suit, namely: subdivision 2 of Section 338 of the Code of Civil Procedure. An examination of Shepard's Citations and the American Digest system indicates that the Conniff



case has never been followed on this point in any of the later decisions of the California Supreme Court or any other Court, nor has it ever been cited on this point except in the case of *Hicks v. Drew*, where it is practically overruled.

The case at bar does not involve the permanent flooding of lands, but on the contrary relates to a specific alleged "rise in the lake" during the latter part of June, 1916. There is no allegation in the complaint, nor any evidence in the record, nor do we believe that plaintiff in error would contend that this brief period of high water in the lake resulted in the permanent flooding of any of plaintiff in error's lands. But in *Hicks v. Drew*, 117 Cal. 305, the Court states that it is only <sup>upon</sup> such a state of facts, to-wit: the permanent flooding of lands in such manner as to amount to a taking, that the decision in the *Conniff* case can be supported. Attention is invited to the fact that *Pumpelly v. Green Bay Co.*, 13 Wall. 166, upon which the decision in the *Conniff* case appears to have been based, was an action of trespass on the case and not trespass, which appears to strengthen the view that in the *Conniff* case the Court failed to distinguish between trespass and such consequential injuries as amount to a permanent injury or virtual taking under the constitutions of the various states which forbid the taking of private property for public use without just compensation. We believe that both logic and the overwhelming weight of the authorities



in California and elsewhere support the view that it is not the extent of the damage done that determines whether the remedy at common law was trespass or case, but the nature of the wrongful act which caused the damage. For example, by merely walking across a man's land, which is a direct trespass, the damage done is less harmful and less permanent in character than that accomplished in the numerous cases of damage by flowage herein cited which were held by the courts to have been trespass on the case.

*Hicks v. Drew, the leading California Case:* Hicks v. Drew, the most carefully considered of the several California decisions which support our contention that the acts of defendant in error constitute trespass on the case, deals with the exact question at issue so thoroughly that we take the liberty of quoting extensively from that case as follows:

“By the instructions to the jury the Court limited a recovery against defendant to damages accruing within two years prior to the filing of the complaint. This instruction was given in view of Section 339 of the Code of Civil Procedure, subdivision 1, which provides that an action founded upon a contract, obligation, or liability not based upon a written instrument must be brought within two years. Appellant denies the application of this statute to the facts of her case, and declares that she had a right to bring the action at any time within three years from the accrual thereof, by virtue of Section 338 of the Code of Civil Procedure,

subdivision 2, which provides that an action for trespass upon real property may be brought within three years after it has accrued. Is the present action one to recover damages for a trespass upon real property? While in this state all distinctions between common law actions are abolished as relating to the procedure, yet it is plain that we are bound to consult the common law, and the classification of common law actions, for the proper determination as to what the law-making power of this state had in mind when using the phrase, 'trespass on real property'.

"It appears that the Courts of England often experienced difficulty in determining whether trespass or case was the true remedy to be pursued. This same difficulty often arises in this state, when the statute of limitations is invoked. But in the case at bar, weighed and tested by the rules of the common law, the distinction between these two forms of common law actions is clearly apparent; and that this case upon its facts is one wherein it is sought to recover upon a liability not based upon an instrument of writing, and, therefore, barred in two years, we are satisfied.

"One of the best tests by which to distinguish trespass is found in the answer to the question, when was the damage done? If the damage does not come directly from the act, but is simply an after result from the act, it is essentially consequential, and no trespass. Chitty says: 'If a log, in the act of being thrown into the highway, hit another, the injury is immediate;

but if, after it has reached the highway, a person fall over it and be hurt, the injury is only consequential, and the remedy should be case.

\* \* \* So, if a person pour water on my land, the injury is immediate, but if he stop up a watercourse on his own land, whereby it is prevented from flowing to mine as usual, or if he place a spout on his own building, in consequence of which water afterward runs therefrom into my land, the injury is consequential; because the flowing of the water, which was the immediate injury, was not the wrongdoer's immediate act, but only the consequence thereof, and which will not render the act itself a trespass or immediate wrong." (Crittly on Pleading, 142.) Gould on Water, Section 210, declares: *'It is not a trespass to flow the land of another with water by erecting a dam below his land, for any one may lawfully build a dam on his own land, and the act, being injurious only in its consequences, is to be redressed by an action on the case'*. Angell on Watercourses, at section 395, in speaking as to the remedy of action on the case, says: 'This remedy is the judicial one now always resorted to in the usual case of consequential injury to or by means of a watercourse. The general result of the English authorities renders it very clear that where damages do not immediately ensue from the act complained of, it is consequential, and case is the proper remedy; and, on the contrary, where the act itself, and not the consequences of it, occasions the mischief, trespass is the right action.' In *Perrine v. Bergin*, 14 N. J. L. 355, 27 Am. Dec. 63, where the lands of an upper

owner upon the stream were overflowed by a dam of the lower owner, it is said: *'So far from being ouster, it is not even a trespass, to flow the land of another with water by erecting a dam below his land, for the act itself is lawful. Any man may build a dam by common right on his own land, and trespass never lies when the act is lawful in itself, and injurious only in its consequences. \* \* \** It is therefore no dispossession, no ouster, nor even a trespass, to flow water backward on another person's land. It is denominated in law a nuisance and annoyance to the tenant in possession; and his only modern remedy is by an action on the case, founded on his possession.'

"To support plaintiff's contention that defendant's acts, in law, constituted a trespass upon plaintiff's realty, certain decisions of this Court are relied upon; but those decisions fail to accomplish the result, and are not opposed to the views of the common law writers from which we have quoted. In *Triscony v. Brandenstein*, 66 Cal. 514, this Court held that a cause of action for trespass upon realty was stated in a complaint which charged that defendant 'wrongfully and unlawfully entered upon plaintiff's lands and \* \* \* depastured the same with five hundred head of cattle and ten head of horses, to plaintiff's damage'. Clearly, here was an unlawful entry and damage done to the realty. The cattle and horses were but the means by which the damage was done. Any other means used to do the damage, by the party who made the entry, would have been equally sufficient in making out a cause of



action. In that case there was an actual unlawful entry, accompanied by damage. The act of entry was unlawful, and the damage done was in no sense consequential. The entry and damage were inseparably connected. *Zumwalt v. Dickey*, 92 Cal. 156, is in all respects a similar case. *Conniff v. San Francisco*, 67 Cal. 45, in principle is more like the case at bar. At the same time there is a material and substantial difference. In addition it may be suggested that the principles laid down by *Conniff* case find support in *Pumpelly v. Green Bay etc. Company*, 13 Wall., 166; and it was largely upon the authority of that case that the decision in *Conniff v. San Francisco*, *supra*, was based. Yet the same high court that decided *Pumpelly v. Green Bay etc. Co.*, *supra*, in a recent decision said that declared 'the extremest limitation of the doctrine to be found'. (*Transportation Co. v. Chicago*, 99 U. S. 642.) In considering the *Pumpelly* case, and *Eaton v. Boston etc. R. R. Co.*, 51 N. H. 504, 12 Am. Rep. 147, the Supreme Court of the United States said: 'In these actions it was held that permanent flooding of private property may be regarded as a 'taking'. In these cases there was a physical invasion of the real estate of the private owner, and a practical ouster of his possession'. *In the Conniff case the facts were declared by this Court to be the same as we have just quoted, and it is only upon such a state of facts that the decision may be supported.* The facts of the case at bar do not bring it within the doctrine of *Conniff v. San Francisco*, *supra*. If the dam or bulk-head erected by defendant upon his land had



resulted in the prevention of water flowing upon plaintiff's land, which had been accustomed to so flow, and damage to plaintiff's freehold had been the result, it could hardly be contended that such acts amounted to a trespass upon real estate. Yet, upon principle, the action for redress would be the same as in the case at bar."

Hicks v. Drew, 117 Cal. 305.

(The italics are ours.)

*Later California Cases follow Hicks v. Drew:* In the case of Crim v. San Francisco, 152 Cal. 279, the City and County of San Francisco maintained a sewer over and across a certain tract of land belonging to the City, called the Almshouse Tract, but did not connect the sewer with any main sewer having a proper outlet until a short time before the commencement of the action. The discharge from said sewer washed out a gully or bed for itself through the property of the plaintiff and carried away large quantities of soil therefrom. The Court said in part:

"It is clear, however, that the wrongful acts alleged against defendant in the case at bar do not constitute trespass upon real property. That was definitely settled by this court in Hicks v. Drew, 117 Cal. 305 (49 Pac. 189), which raised the same question as is presented here, and in which the court said: 'If the damage does not come directly from the act, but is simply an after result from the act, it is essentially consequential and no trespass'. For

the wrongful acts alleged in the case at bar the remedy at common law would have been 'an action on the case', and although the old forms of actions are abolished, the facts which constitute 'trespass on real property' still govern."

Crim v. City & County of San Francisco, 152 Cal. 279.

In the case of *Daneri v. Southern California Railway Co.*, 122 Cal. 507, where a levee constructed by the railway company deflected the waters of a river and caused them to form a new channel cut through the lands of plaintiff, the Court held that this was an action of trespass on the case and was barred after two years from the time the cause of action arose. The Court cited *Hicks v. Drew* and other authorities in support of its decision.

The following quotation is taken from the still more recent case of *Porter v. Los Angeles*, 182 Cal. 515, decided in 1920, which appears to be the last word of the California Supreme Court on this particular question:

"It is the settled law in this state that the three years' period of limitation for an action for trespass upon real property applies only where there is some entry upon the premises of plaintiff or direct or intentional injury thereto, amounting to a trespass thereon, and does not apply to actions in which the injury caused to the plaintiff's real property is consequential only and arises from some lawful act of defendant not done upon the plaintiff's property, but committed elsewhere, and causing as

a consequence thereof some injury to plaintiff's property not arising from an entry thereon by defendant or his agencies. (Hicks v. Drew, 117 Cal. 305; Daneri v. Southern C. R. Co., 122 Cal. 507; Crim v. San Francisco, 152 Cal. 279.) The decisions in other states having a similar Statute of Limitations are to the same effect. (Welch v. Seattle etc. Co., 56 Wash. 97; Denney v. Everett, 46 Wash. 342; Rountree v. Brantley, 34 Ala. 554; Eagle County v. Gibson, 62 Ala. 369; Platt etc. Co. v. Waterbury, 80 Conn. 184.)"

Porter v. Los, Angeles, 182 Cal. 515.

It is interesting to note that each of these three California cases, while passing upon the exact point upon which plaintiff in error claims the Conniff case is decisive, omits any mention of the Conniff case, apparently on the theory that this case was overruled by Hicks v. Drew.

*Overwhelming Weight of Authority Supports California Decision in Hicks v. Drew:*

The authorities of the various common law jurisdictions are fully in accord with the rule laid down in Hicks v. Drew. Even those authorities relied upon by plaintiff in error, with the exception of the Conniff case hereinbefore discussed, are not out of harmony with Hicks v. Drew, as will be noted from the following. This statement does not take into consideration the obiter dictum of Justice Olney, quoted on pages 16 and 17 of plaintiff in error's brief, which is in the nature of a dissent from the

decision of the other six justices who cited the Hicks case with approval.

*Discussion of Authorities of Plaintiff in Error:*  
In addition to the Conniff case and Justice Olney's protest, plaintiff in error has cited only the following seven authorities in his brief:

1 Chitty on Pleadings, p. 196 (p. 6 of his brief).

Pumpelly v. Green Bay Co., 13 Wall 166 (p. 7 of his brief).

Kelly v. Lett, 35 N. C. 50, 3 Blackstone's Comm. 123, Gale (Gates) v. Miles, 3 Conn. 70 (p. 8 of his brief).

6 Cyc., 684.

1 Bouv. Law Dict., p. 288 (p. 10 of his brief).

As we feel that these authorities do not support plaintiff in error's contention we will discuss them in the order in which they were cited.

(1) We assume that there was some inadvertent inaccuracy in his reference to 1 Chitty, p. 196, as we find nothing on the page referred to which seems in point on either side of this question, although 1 Chitty, p. 142, as quoted and approved in the Hicks case (see p. 9 of this brief) is deemed to be clearly opposed to the theory of plaintiff in error.

(2) The case of Pumpelly v. Green Bay Co. was an action of trespass on the case and therefore can hardly be said to support his contention that the facts constitute trespass rather than case.



(3) In *Kelly v. Lett*, 35 N. C. 50, a case cited by plaintiff in error, the defendant owned a mill dam above the mill dam of plaintiff on the same stream and purposely and maliciously accumulated the waters above his mill dam for the express purpose of discharging them against the mill dam of the plaintiff to destroy it. The Court said:

“When the act itself is complained of, trespass *vi et armis* is the proper action. When the consequences only are complained of, then case is the proper action. \* \* \* Suppose the defendant had planted a cannon on his dam and wilfully fired at the plaintiff’s dam until it was demolished; it could not be distinguished from the present case—the only difference being in the kind of force. In the one the dam is destroyed by metal propelled by the force of gunpowder; in the other it is destroyed by water, propelled by the force of gravitation—the water being kept back on purpose to increase the head and thereby add to the power of the propelling force. Both are neither more nor less than willful trespass.”

Surely this case lends no support to the theory urged by plaintiff in error. This was not a case of injury from backwater from a dam, but, on the contrary, the dam was being used in this case for an unlawful purpose. It was operated expressly and solely with a view to the direct discharge of water upon plaintiff’s dam below. This distinction



is made clear in the later case of *Shaw v. Etheridge*, 52 N. C. 225, in which the same Court held that where defendant obstructed a drainage ditch by throwing in clay and other material at a point on his own land just below the boundary line between his land and that of the plaintiff, with the result that a considerable portion of plaintiff's land was inundated and his crops damaged, case was the appropriate remedy since the injury was consequential and not direct. Here the Court said:

“The case is manifestly distinguishable from that of *Kelly v. Lett*, 35 N. C. 50, in which it was alleged that the plaintiff was the owner of a mill a short distance below the one occupied by defendant on the same stream and that the defendant *willfully, and with the intent to injure the plaintiff*, frequently shut down his gates so as to accumulate a large head of water and then raised them, by which means an immense volume of water was thrown with great force against the plaintiff's dam and swept it away.” (Italics in original text.)

See also *Hogwood v. Edwards*, 61 N. C. 350, to the same effect.

(4) As to plaintiff in error's next authority we deem the following quotation a sufficient commentary:

“And it is a settled distinction that where an act is done which is in itself an *immediate* injury to another's person or property, there the remedy is usually by an action of trespass *vi et armis*; but where there is no act done but

only a culpable omission or where the act is not immediately injurious, but only by *consequence* and collaterally, there no action of trespass *vi et armis* will lie, but an action on the special case for the damage consequent on such omission or act.” (Italics in original text.)

3 Blackstone Comm. 123.

(5) Taking next *Gates v. Miles* (not *Gale v. Miles*), 3 Conn. 70, cited by plaintiff in error, we find that that was a case in which the defendant was in personal direction of a ship owned by him and the helmsman in obedience to his express order “turned the sloop and in pursuance of the direction thus given she directly struck the *Mary*”, the *Mary* being another ship owned by the plaintiff. Here the court very properly held that it was trespass. We submit that the facts and decision in this case do not tend to support plaintiff in error’s contention.

(6) As for plaintiff in error’s sixth authority we quote:

“For a tort committed with force and intentionally, the immediate consequence of which is injury, trespass is the appropriate remedy. If the injury proceeds from mere negligence or is not the immediate consequence of tort, case is the appropriate remedy. The injury is considered immediate when the act complained of itself and not merely a consequence of that act occasions the injury.”

6 Cyc. 684.

(7) On the page cited by plaintiff in error Bouvier says that the action of case lies for:

“Torts committed forcibly when the injury is consequential merely, and not immediate; (citing authorities) as special damage from a public nuisance; (citing authorities) acts done on the defendant’s land which by immediate consequence injure the plaintiff” (citing authorities).

1 Bouv. Law Dict., p. 288.

*Some Other Authorities in Point:* We have made what we believe to be a fairly thorough examination of the authorities in this matter and we feel that the overwhelming weight of the decisions, as well as the almost unanimous conclusion of text and encyclopedia writers, supports the view expressed in 11 Corpus Juris 9, to the effect that

“Case is the appropriate remedy for the recovery of damages occasioned by the construction of a dam or other obstruction in the stream and resulting in the flooding of plaintiff’s land”.

11 Corpus Juris 9;

1 Corpus Juris 1001;

4 Sutherland Code Pleading and Practice,  
Art 6533;

Crockett v. Millett, 65 Me. 191, 195;

Keller v. Stoltz, 71 Pa. St. 356;

Fifield v. Bailey, 55 N. H. 380;

1 Bouv. Law Dict., p. 288;

Wabash v. Spear, 16 Ind. 441, 79 Am. De.  
444, ~~26~~ R. C. L. 988, 989.

The case of *Crockett v. Millett*, 65 Me. 191, cited above, is so nearly like the case at bar on the facts that we feel it deserves particular consideration. In this case the defendants owned the land upon which their dam was built, but owned no mill. They erected and maintained the dam as a reservoir dam for the benefit of mill owners below, but had no interest in the mill for the use of which the water was retained, nor in the land upon which the mill was erected. The plaintiffs owned certain lands above the dam which were overflowed. The suit was an *action on the case* to recover damages caused by the backwater. The Court said:

“The plaintiff has been injured by the defendants’ dam and is entitled to compensation therefor. The question presented for determination is whether this action is maintainable or whether the process should not have been a complaint under R. S. C. 92, Art. 1. \* \* \* It is apparent that in accordance with the decision of this Court a complaint under the flowage act can not be maintained (because defendant was not the owner of a mill), but there is a remedy for the injury sustained and that is by an action on the case, which was the common law remedy before any legislation on the subject.”

*Crockett v. Millett*, 65 Me. 191, 195.

(The parenthetical clause was inserted by us.)

*Federal Courts Bound by State Courts’ Construction of Statute of Limitations:*

Federal Courts will follow the construction which the Supreme Court of a state places upon its own



Statute of Limitations. In *Bauserman v. Blount*, Mr. Justice Gray of the United States Supreme Court cites eighteen decisions of that Court in support of his statement that

“No laws of the several states have been more steadfastly or more often recognized by this court, from the beginning, as rules of decision in the courts of the United States, than statutes of limitation of actions, real and personal, as enacted by the legislature of a state and as construed by its highest court.”

*Bauserman v. Blount*, 147 U. S. 647, 13 Sup. Ct. 466, 468, 37 L. Ed. 316.

In the case of *Great Western Telegraph Co. v. Purdy*, the same Judge cites four United States Supreme Court decisions as authority for the proposition that

“The limitation of actions is governed by the *lex Fori*, and is controlled by the legislation of the state in which the action is brought, as construed by the highest court of that state, even if the legislative act, or the judicial construction, differs from that prevailing in other jurisdictions. *McElmoyle v. Cohen*, 38 U. S. 13 Pet. 312; *Bauserman v. Blount*, 147 U. S. 647; *Metcalf v. Watertown*, 153 U. S. 671; *Balkam v. Woolstock*, 154 U. S. 177.”

*Western Telegraph Co. v. Purdy*, 162 U. S. 329; 40 L. Ed. 986.

In *Quinette v. Pullman*, 229 Fed. 333, at p. 337 thereof, the Circuit Court of Appeals of the Eighth



Circuit, in an opinion handed down in 1916, after a comprehensive review of the authorities above cited and more modern ones, states that "No case has been found where the Supreme Court has under any circumstances authorized a departure from this rule".

In conclusion we submit that the foregoing authorities establish the three propositions outlined at the beginning of this brief, to-wit: that the ruling of the District Court followed the decisions of the Supreme Court of California; that it is in accord with the great weight of authority; that it was bound to follow such California decisions even though they were opposed to the weight of authority. The ruling of the District Court should accordingly be affirmed.

Respectfully submitted,  
JOHN T. WILLIAMS,  
*United States Attorney,*

E. M. LEONARD,  
*Assistant United States Attorney,*

HENRY A. COX,  
*District Counsel, U. S. Reclama-  
tion Service,*





